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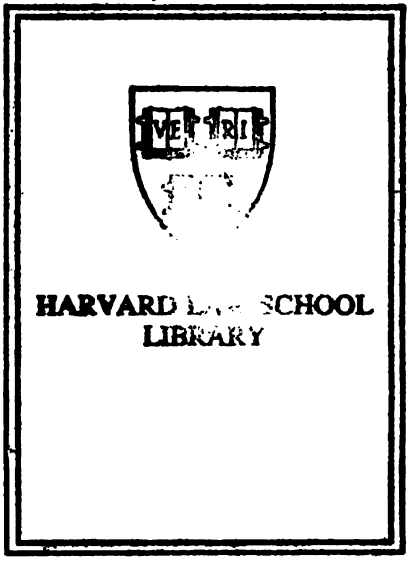
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MINNESOTA REPORTS

VOL. 67

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

DECEMBER 24, 1896—APRIL 21, 1897

HENRY B. WENZELL
REPORTER

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

Rec. Sept. 14, 1898

JUSTICES

OF THE

SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. CHARLES M. START, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

DARIUS F. REESE, Esq., Clerk.

ATTORNEY GENERAL,
HON. HENRY W. CHILDS.

NOTE.

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). Of the cases in this volume those preceding the case on page 506 are from the October, 1896, term calendar, as is also the case on page 514, and the remaining cases are from the April, 1897, term calendar.

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

CASES REPORTED.

	Page
Aermotor Co., (Connor Gahagan v.)	252
Aermotor Co., (Cornelius Gahagan v.)	252
American Baptist Missionary Union v. Hastings	303
American Loan & Trust Co., (Board of Commrs. of St. Louis County v.)	112
American Savings & Loan Assn., (Babcock v.)	151
Anderson v. C. N. Nelson Lumber Co.	79
Babcock v. American Savings & Loan Assn.	151
Backer, (Murphy v.)	510
Backus, (Farmers' Nat. Bank of Owatonna v.)	43
Bank of Minnesota, (Stolze v.)	172
Barber, (Mahoney v.)	308
Baumann v. City of Duluth	283
Beckett v. Gridley	37
Beckett v. Northwestern Masonic Aid Assn.	298
Bendel, (Hurley v.)	41
Benton, (Wheeler v.)	293
Billson v. Lardner	35
Bloom, (Diment v.)	111
Board of Commrs. of Goodhue County v. Duluth, R. W. & S. R. Co.	213
Board of Commrs. of Hennepin County, (Schussler v.)	412
Board of Commrs. of Red Lake County, (State v.)	352
Board of Commrs. of Redwood County v. Citizens' Bank of Redwood Falls	236
Board of Commrs. of St. Louis County v. American Loan & Trust Co.	112
Board of Courthouse & City Hall Commrs., (Burlington Mnfg. Co. v.)	327
Boyd, (Stendal v.)	279
Bradley v. Norris	48
Bradley v. Thorne	281
Brattland v. Calkins	119
Brown v. Village of Heron Lake	146
Burau v. Great Northern Ry. Co.	434
Burlington Mnfg. Co. v. Board of Courthouse & City Hall Commrs.	327
Butchart, (Pabst Brewing Co. v.)	191
Calkins, (Brattland v.)	119
Cannon River Manufacturers' Assn., (State v.)	14
Carlson v. Presbyterian Board of Relief	436
Carpenter v. Eastern Railway Company of Minnesota	188
Chamberlain, (Murray v.)	12
Chapel, (Kent v.)	420
Chicago, M. & St. P. Ry. Co., (Riley v.)	165
Chicago, St. P., M. & O. Ry. Co., (Christianson v.)	94
Chicago, St. P., M. & O. Ry. Co., (Fletcher v.)	339
Childs, (Easton v.)	242
Christianson v. Chicago, St. P., M. & O. Ry. Co.	94

	Page
Citizens' Bank of Redwood Falls, (Board of Commrs. of Redwood County v.)	236
City of Duluth, (Baumann v.)	283
City of St. Paul, (Glaeser v.)	368
City of St. Paul, (Hammargren v.)	6
City of St. Paul, (McHugh v.)	441
Clifford v. Minor	512
C. N. Nelson Lumber Co., (Anderson v.)	79
Connor Gahagan v. Aermotor Co.	252
Cook v. Parker	374
Cooper v. Hayward	92
Cornelius Gahagan v. Aermotor Co.	252
Cowles, (Stewart v.)	184
Crystal Lake Cemetery Assn., (Menage v.)	131
Crystal Lake Cemetery Assn., (Northern Trust Co. v.)	131
Dean, (Wiley v.)	62
Deering (Wm.) & Co. v. Shumpik	348
Dillman, (Eagle Roller-Mill Co. v.)	232
Diment v. Bloom	111
Duluth, R. W. & S. R. Co., (Board of Commrs. of Goodhue County v.)	213
Eagle Roller-Mill Co. v. Dillman	232
Eastern Railway Company of Minnesota, (Carpenter v.)	188
Easton v. Childs	242
Eckman v. Lauer	221
Ege, (Mix v.)	116
Electrical Engineering & Supply Co., (Paget v.)	31
Ermentraut v. Providence-Washington Ins. Co.	451
Evans v. Rhode Island Hospital Trust Co.	160
Fall v. Youmans	83
Farmers' Loan & Trust Co., (Truesdale v.)	454
Farmers' Nat. Bank of Owatonna v. Backus	43
Featherstone, (Walsh v.)	103
Fidelity Mutual Life Assn., (Gardner v.)	207
Fidelity Mutual Life Assn., (Warner v.)	207
First Nat. Bank of Brooklyn v. Slette	425
First Nat. Bank of Waverly v. Forsyth	257
Fletcher v. Chicago, St. P., M. & O. Ry. Co.	339
Forsyth, (First Nat. Bank of Waverly v.)	257
French, (Gregg v.)	402
Gahagan (Connor) v. Aermotor Co.	252
Gahagan (Cornelius) v. Aermotor Co.	252
Gallup, (Kelley v.)	169
Gardner v. Fidelity Mutual Life Assn.	207
Geib, (Streissguth v.)	360
Glaeser v. City of St. Paul	368
Goodrich, (State v.)	176
Gorton v. Town of Forest City	36
Graham, (St. Anthony Falls Bank v.)	318
Graves v. Merrill	463
Great Northern Ry. Co., (Burau v.)	434
Great Northern Ry. Co., (Moore v.)	394
Great Northern Ry. Co., (Morris v.)	74
Great Northern Ry. Co., (Starr v.)	18
Great Northern Ry. Co., (Village of Wayzata v.)	385
Gregg v. French	402
Gridley, (Beckett v.)	37
Griffin, (Kimm v.)	25

	Page
Gross, (Rogers v.)	224
Haider v. St. Paul Fire & Marine Ins. Co.	514
Hammargren v. City of St. Paul	6
Harrison v. Harrison	520
Hastings, (American Baptist Missionary Union v.)	303
Hause v. Mannheimer	194
Hay v. Tuttle	56
Hayne v. Metropolitan Trust Co.	245
Hayward, (Cooper v.)	92
Herber, (Traders' Ins. Co. v.)	106
Hoff, (Johanson v.)	148
Holcomb v. Independent School District of Duluth	321
Hood, (Wisconsin Red Pressed Brick Co. v.)	329
Hurley v. Bendel	41
Independent School District of Duluth, (Holcomb v.)	321
Jarvis, (State v.)	10
Johanson v. Hoff	148
Johnson v. Minneapolis General Electric Co.	141
Johnson v. St. Paul City Ry. Co.	260
Jones v. Northern Trust Co.	410
Kelley v. Gallup	169
Kent v. Chapel	420
Kimm v. Griffin	25
Kittson, (St. Paul Trust Co. v.)	59
Knight v. Schwandt	71
Knutson v. Northwestern Loan & Building Assn.	201
Kreuger, (Peterson v.)	449
Landon, (Watkins v.)	136
Lane v. Minnesota State Agricultural Soc.	65
Lardner, (Billson v.)	35
Larson, (Sharpe v.)	428
Lauer, (Eckman v.)	221
Lewis, (Ray v.)	365
Lockwood v. Lockwood	476
McHugh v. City of St. Paul	441
Mackel, (Tvedt v.)	24
Mahoney v. Barber	308
Mannheimer, (Hause v.)	194
Maurin, (Pelican River Milling Co. v.)	418
Menage v. Crystal Lake Cemetery Assn.	131
Merchants' Bank of Lake City, (State v.)	506
Merrill, (Graves v.)	463
Metropolitan Trust Co., (Hayne v.)	245
Meyer, (Preiner v.)	197
Minneapolis General Electric Co., (Johnson v.)	141
Minneapolis, St. P. & S. Ste. M. Ry. Co., (Mitchelson v.)	406
Minnesota State Agricultural Soc., (Lane v.)	65
Minor, (Clifford v.)	512
Mitchelson v. Minneapolis, St. P. & S. Ste. M. Ry. Co.	406
Mix v. Ege	116
Moore v. Great Northern Ry. Co.	394
Moratzky v. Wirth	46
Morris v. Great Northern Ry. Co.	74
Morse, (Veazie v.)	100
Murphy v. Backer	510
Murray v. Chamberlain	12
Nelson (C. N.) Lumber Co., (Anderson v.)	79
Norris, (Bradley v.)	48
Northern Dakota Elevator Co., (Wemple v.)	87
Northern Trust Co. v. Crystal Lake Cemetery Assn.	131
Northern Trust Co., (Jones v.)	410
Northwestern Loan & Building Assn., (Knutson v.)	201

	Page
Northwestern Masonic Aid Assn., (Beckett v.)	298
Old Second Nat. Bank of Aurora v. Town of Middletown	1
Olson v. Schultz	494
Olson v. State Bank	267
Pabst Brewing Co. v. Butchart	191
Paget v. Electrical Engineering & Supply Co	31
Park Brothers & Co. v. Sykes	153
Parker, (Cook v.)	374
Pelican River Milling Co. v. Maurin	418
Peterson v. Kreuger	449
Place v. St. Paul Title Ins. & Trust Co.	126
Plymouth Cordage Co. v. Seymour	311
Preiner v. Meyer	197
Presbyterian Board of Relief, (Carlson v.)	436
Probate Court of Rock County, (State ex rel. Security Trust Co. v.)	51
Providence-Washington Ins. Co., (Ermentraut v.)	451
Ray v. Lewis	365
Rhode Island Hospital Trust Co., (Evans v.)	160
Riggs v. Thorpe	217
Riley v. Chicago, M. & St. P. Ry. Co.	165
Rogers v. Gross	224
Rudnick, (Sage v.)	362
St. Anthony Falls Bank v. Graham	318
St. Paul City Ry. Co., (Johnson v.)	260
St. Paul City Ry. Co., (Saiko v.)	8
St. Paul City Ry. Co., (Weber v.)	155
St. Paul Fire & Marine Ins. Co., (Haider v.)	514
St. Paul Title Ins. & Trust Co., (Place v.)	126
St. Paul Trust Co. v. Kittson	59
Sage v. Rudnick	362
Saiko v. St. Paul City Ry. Co.	8
Schultz, (Olson v.)	494
Schussler v. Board of Commrs. of Hennepin County	412
Schwandt, (Knight v.)	71
Security Bank of Duluth, (Shay v.)	287
Seymour, (Plymouth Cordage Co. v.)	311
Sharpe v. Larson	428
Shay v. Security Bank of Duluth	287
Shumpik, (Wm. Deering & Co. v.)	348
Sisters of the Order of St. Benedict, (Will v.)	335
Slette, (First Nat. Bank of Brooklyn v.)	425
Starr v. Great Northern Ry. Co.	18
Starz, (Towle v.)	370
State v. Cannon River Manufacturers' Assn.	14
State v. Goodrich	176
State v. Jarvis	10
State v. Merchants' Bank of Lake City	506
State Bank, (Olson v.)	267
State ex rel. Childs v. Board of Commrs. of Red Lake County	352
State ex rel. Hagestad v. Sullivan	379
State ex rel. Security Trust Co. v. Probate Court of Rock County	51
Stendal v. Boyd	279
Stewart v. Cowles	184
Stolze v. Bank of Minnesota	172
Streissguth v. Geib	360
Sullivan, (State ex rel. Hagestad v.)	379
Sykes, (Park Brothers & Co. v.)	153

	Page
Thorne, (Bradley v.)	281
Thorpe, (Riggs v.)	217
Towle v. Starz	370
Town of Forest City, (Gorton v.)	36
Town of Middletown, (Old Second Nat. Bank of Aurora v.)	1
Traders' Ins. Co. v. Herber	106
Truesdale v. Farmers' Loan & Trust Co	454
Tuttle, (Hay v.)	56
Tvedt v. Mackel	24
Veazie v. Morse	100
Village of Heron Lake, (Brown v.)	146
Village of Wayzata v. Great Northern Ry. Co	385
Walsh v. Featherstone	103
Walter A. Wood Harvester Co., (Wulff v.)	423
Warner v. Fidelity Mutual Life Assn	207
Watkins v. Landon	136
Weber v. St. Paul City Ry. Co.	155
Wemple v. Northern Dakota Elevator Co	87
Wheeler v. Benton	293
Wiley v. Dean	62
Will v. Sisters of the Order of St. Benedict	335
Wm. Deering & Co. v. Shumpik	348
Wilson v. Wilson	444
Wirth, (Moratzky v.)	46
Wisconsin Red Pressed Brick Co. v. Hood	329
Wulff v. Walter A. Wood Harvester Co	423
Youmans, (Fall v.)	83

CASES CITED BY THE COURT.

I. CASES FROM MINNESOTA REPORTS.

	Page
Abel v. Butler-Ryan Co., 66 Minn. 16,	144
Acker Post v. Carver, 23 Minn. 567,	363
Allis v. Davidson, 23 Minn. 442,	135
American B. & L. Assn. v. Waleen, 52 Minn. 23,	163
Ames & Frost Co. v. Smith, 65 Minn. 304.	90
Ames v. Mississippi B. Co., 8 Minn. 417 (467),	319
Baker v. Pottle, 48 Minn. 479,	290, 292
Bank of Farmington v. Ellis, 30 Minn. 270,	317
Barber v. Morris, 37 Minn. 194,	125, 245
Bardwell v. Collins, 44 Minn. 97,	245
Bausman v. Credit G. Co., 47 Minn. 377,	105
Bausman v. Faue, 45 Minn. 412,	324
Bazille v. Murray, 40 Minn. 48,	135
Becker's Inv. Ag. v. Rea, 63 Minn. 459,	172, 174
Bedal v. Spurr, 33 Minn. 207,	70
Board of Commrs. of Hennepin Co. v. State Bank, 64 Minn. 180,	115
Board of Commrs. of St. Louis Co. v. American Loan & Trust Co., 67 Minn. 112,	239
Board of Trustees v. Brown, 66 Minn. 179,	210
Bradley v. Norris, 63 Minn. 156,	48, 49
Bradley v. Norris, 67 Minn. 48,	61
Breen v. Kelly, 45 Minn. 352,	154
Campbell v. Jones, 25 Minn. 155,	288
Campbell v. Rotering, 42 Minn. 115,	105
Caplis v. American F. I. Co., 60 Minn. 376,	130
Carlson v. Northwestern T. E. Co., 63 Minn. 428,	144
Carlson v. Small, 32 Minn. 492,	70
Carroll v. Williston, 44 Minn. 287,	67
Chamberlain v. O'Brien, 46 Minn. 80,	292
Christian v. Bowman, 49 Minn. 99,	194
Christianson v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 249,	94
City of Wabasha v. Southworth, 54 Minn. 79,	498
City of Winona v. School Dist., 40 Minn. 13,	356
Clark v. Lee, 58 Minn. 410,	140
Clerihew v. West Side Bank, 50 Minn. 538.	56, 58
Colby v. Colby, 59 Minn. 432,	139
Columbia E. Co. v. Dixon, 46 Minn. 463,	195
Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224,	297
Commrs. Mower Co. v. Smith, 22 Minn. 97,	411
Cooper v. St. Paul C. R. Co., 55 Minn. 134.	422
Corson v. Shoemaker, 55 Minn. 386,	242, 243, 245
Croft v. Miller, 26 Minn. 317,	319
Curtis v. St. Paul & S. R. Co., 21 Minn. 497,	347
Day v. Akeley Lumber Co., 54 Minn. 522,	7
Delude v. St. Paul C. R. Co., 55 Minn. 63.	67
Dimond v. Manheim, 61 Minn. 178,	324
Dobbin v. Cordiner, 41 Minn. 165,	73
Donnelly v. Simonton, 7 Minn. 110 (167),	439
Duncan v. Kohler, 37 Minn. 379.	189
Dunn v. State Bank, 59 Minn. 221,	267, 273, 274, 279
Easton v. Hyde, 13 Minn. 83 (90),	427
Engesether v. Great Northern R. Co., 65 Minn. 168,	188, 191
Erickson v. Brandt. 53 Minn. 10,	498
Ermentrout v. American F. I. Co., 60 Minn. 418,	439
Farmers L. & T. Co. v. Minneapolis E. & M. W., 35 Minn. 543,	288
Farmers National Bank of Owatonna v. Backus, 63 Minn. 115,	44
Farmers National Bank of Owatonna v. Backus, 64 Minn. 43.	44
Finnegan v. Noerenberg, 52 Minn. 239,	195
Firkins v. Chicago G. W. R. Co., 61 Minn. 31,	160
First Nat. Bank v. St. Croix Boom Co., 41 Minn. 141,	438
First Nat. Bank v. Scott Co., 14 Minn. 59 (77),	257, 258, 259
Flower v. Cornish, 25 Minn. 473,	291
Foster v. Moulton, 35 Minn. 458,	195
Freeman v. Lawton, 58 Minn. 546,	186

Page

Gallagher v. Rosenfield, 47 Minn. 507, 193, 292
Gates v. Shugrue, 35 Minn. 392, 522
Godfrey v. Valentine, 39 Minn. 336, 125
Grant v. Schmidt, 22 Minn. 1, 301
Greene v. Dwyer, 33 Minn. 403, 188, 189
Gurney v. Minneapolis U. E. Co., 63 Minn. 70, 344

Hass v. Billings, 42 Minn. 63, 136, 138, 140
Hastings v. Thompson, 54 Minn. 184, 427
Heidel v. Benedict, 61 Minn. 170, 460
Heintzelman v. Druids R. Assn., 38 Minn. 138, 344
Hemstad v. Hall, 64 Minn. 136, 320
Henry v. Bruns, 43 Minn. 295, 411
Herrick v. Baldwin, 17 Minn. 183 (209), 84
Hersey v. Bennett, 28 Minn. 86, 241
Horton v. Maffitt, 14 Minn. 216 (289), 439
Hospes v. Northwestern M. & C. Co., 41 Minn. 256, 213
Howe v. Mplis., St. P. & S. S. M. R. Co., 62 Minn. 71, 262, 266
Hunt v. Conrad, 47 Minn. 557, 420, 422, 423

In re Ackerman, 33 Minn. 54, 522
In re Holt's Will, 56 Minn. 33, 337
In re Mills, 34 Minn. 296, 54
In re St. Paul & N. P. Ry. Co., 34 Minn. 227, 346

Jacobus v. St. Paul & C. R. Co., 20 Minn. 110 (125), 22
Janeway v. City of Duluth, 65 Minn. 292, 284
Jefferson v. Church of St. Matthew, 41 Minn. 392, 241
Joannin v. Ogilvie, 49 Minn. 564, 303, 308
Johanson v. Hoff, 63 Minn. 296, 149
Johnson v. Northwestern T. E. Co., 54 Minn. 37, 49
Jordan v. Board, 39 Minn. 298, 327

Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419, 347
Keator v. Glaspie, 44 Minn. 448, 112
Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207, 280
Kernan v. St. Paul C. R. Co., 64 Minn. 312, 319, 320
Kroessin v. Keller, 60 Minn. 373, 493, 494

Lane v. Minnesota State Agricultural Society, 62 Minn. 175, 66
Larson v. Northern Pac. R. Co., 33 Minn. 20, 363
Layman v. Minneapolis S. R. Co., 66 Minn. 452, 49

Page

Lommen v. Minneapolis G. Co., 65 Minn. 196, 167

McMahon v. Davidson, 12 Minn. 232 (357), 319
Mackubin v. Smith, 5 Minn. 296 (367), 243
Maudlin v. American S. & L. Assn., 63 Minn. 358, 151, 152
Maxwell v. Schwartz, 55 Minn. 414, 49
Merrill v. Ressler, 37 Minn. 82, 288, 291, 292
Miesen v. Canfield, 64 Minn. 513, 169, 170
Miller v. City of St. Paul, 38 Minn. 134, 443
Minnesota G. L. E. Co. v. Denslow, 46 Minn. 171, 195
Mitchell v. Easton, 37 Minn. 335, 372
Morse v. Minneapolis & St. L. R. Co., 30 Minn. 465, 7
Murphy v. Commrs. of Steele Co., 14 Minn. 51 (67), 4
Murray v. Pillsbury, 59 Minn. 85, 90, 91
Myers v. Duluth T. R. Co., 53 Minn. 335, 37

Newton v. Newton, 46 Minn. 33, 317

Perine v. Grand Lodge, 48 Minn. 82, 301
Pierce v. Wagner, 64 Minn. 265, 192
Pillsbury v. Morris, 54 Minn. 492, 30
Pinney v. Fridley, 9 Minn. 23 (34), 436, 438
Pioneer S. L. Co. v. Farnham, 50 Minn. 315, 163
Pratt v. Pioneer Press Co., 30 Minn. 41, 432
Pratt v. Pioneer Press Co., 32 Minn. 217, 432
Putnam v. Pitney, 45 Minn. 242, 53

Rait v. New England F. & C. Co., 66 Minn. 76, 252, 255
Rice v. Austin, 19 Minn. 74 (103), 251
Robbins v. St. Paul & S. R. Co., 24 Minn. 191, 347
Rogers v. Holyoke, 14 Minn. 387 (514), 319
Rolseth v. Smith, 38 Minn. 14, 279, 280

St. Paul & M. T. Co. v. Harrison, 64 Minn. 300, 40
St. Paul & M. T. Co. v. Leck, 57 Minn. 87, 174
St. Paul Trust Co. v. Kittson, 62 Minn. 408, 59, 60, 61, 62
Sawyer v. Harrison, 43 Minn. 297, 24, 25
Schaps v. Lehner, 54 Minn. 208, 78
Schleuder v. Corey, 30 Minn. 501, 49
Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68, 453
Scott v. St. Paul & C. R. Co., 21 Minn. 322, 344

Page

Seamans v. Christian B. M. Co., 66 Minn. 205, 250
Seibert v. Minneapolis & St. L. R. Co., 52 Minn. 246, 456, 457, 458, 459, 460, 461, 462
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 39, 456
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 53, 456
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 58, 456
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 65, 456
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 69, 456
Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 72, 456
Semrow v. Semrow, 23 Minn. 214, 301
Simonson v. Grant, 36 Minn. 439, 475
Smith v. Pearson, 44 Minn. 397, 293
Smith v. Stewart, 41 Minn. 7, 432
State v. Adamson, 43 Minn. 196, 182
State v. Bechdel, 38 Minn. 278, 319
State v. Braden, 40 Minn. 174, 251
State v. Geib, 66 Minn. 266, 361
State v. Honerud, 66 Minn. 32, 356
State v. Kinsella, 14 Minn. 395 (524), 356
State v. McIntyre, 19 Minn. 65 (93), 11, 12
State v. Park & Nelson Lumber Co., 58 Minn. 330, 17
State v. Pioneer Press Co., 66 Minn. 536, 355
State v. Riebe, 27 Minn. 315, 183
State v. Wheeler, 19 Minn. 70 (98), 183
State v. Wood, 13 Minn. 112 (121), 181
State S. & D. M. Co. v. Adams, 47 Minn. 399, 301
Steffenson v. Chicago, M. & St. P. R. Co., 51 Minn. 531, 67
Stemper v. Higgins, 38 Minn. 222, 123
Stewart v. Duncan, 40 Minn. 410, 138
Talboys v. Boston, 46 Minn. 144, 186
Thomas Mnfg. Co. v. Foote, 46 Minn. 240, 288, 290, 292
Thompson v. Myrick, 24 Minn. 4, 135
Tidd v. Rines, 26 Minn. 201, 200
Tilleny v. Wolverton, 54 Minn. 75, 49
Todd v. Rustad, 43 Minn. 500, 362
Truelsen v. City of Duluth, 60 Minn. 132, 284
Truelsen v. City of Duluth, 61 Minn. 48, 284
Truesdale v. Philadelphia T., S. D. & I. Co., 63 Minn. 49. 456, 457
Truesdale v. Sidle, 65 Minn. 315, 151, 153
Turner v. Holleran, 11 Minn. 168 (253), 347
Tuttle v. Wilson, 42 Minn. 233, 411
Twist v. Winona & St. P. R. Co., 39 Minn. 164, 280
Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438, 387, 388, 389, 390, 391, 393
Washington L. & T. Co. v. McKenzie, 64 Minn. 273, 303, 306, 307
Watkins v. Landon, 52 Minn. 389, 138, 139
Webb v. Fisher, 57 Minn. 441, 67
Weld v. Weld, 28 Minn. 33, 301
Weller v. Eames, 15 Minn. 376 (461), 105
West v. Hennessey, 58 Minn. 133, 390
Wilder v. Peabody, 37 Minn. 248, 174
Wilkin v. First Division, 16 Minn. 244 (271), 345
Wilkins v. Sherwood, 55 Minn. 154, 139
Wilson v. Minnesota F. M. F. I. A., 36 Minn. 112, 189
Wisconsin Red-Pressed Brick Co. v. Hood, 54 Minn. 543, 329, 330, 331
Wisconsin Red-Pressed Brick Co. v. Hood, 60 Minn. 401, 330
Wolf v. McKinley, 65 Minn. 156, 35, 36
Wolford v. Crystal Lake C. Assn., 54 Minn. 440, 133, 134, 135, 136
Woodling v. Knickerbocker, 31 Minn. 268, 432

II. OTHER CASES.

Allis v. Moore, 2 Allen, 306, 171
American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 518
Archdale v. Moore, 19 Ill. 565, 335
Arnold v. Richmond Iron Works, 1 Gray, 434, 78
Aspinwall v. Butler, 133 U. S. 595, 276
Baker v. Baker, 16 Abb. N. C. 293, 491
Baker v. Bryan, 64 Iowa, 561, 155
Baldwin v. Temple, 101 Cal. 396, 364
Bank v. Cooper, 36 Me. 179, 114
Barkley v. Railway Co., 27 Hun, 515, 411
Bennett v. Bennett, 116 N. Y. 584, 482, 484
Bluett v. Osborne, 1 Starkie, 384, 334
Borden v. Sackett, 113 Mass. 214, 450
Boss v. Hewitt, 15 Wis. 260, 258
Bradley v. Lill, 4 Biss. 473, 427
Bragg v. Morrill, 49 Vt. 45, 335
Bragg v. Shain, 49 Cal. 131, 475
Breuner v. Liverpool, L. & G. Ins. Co., 51 Cal. 101, 518
Brooks v. Mitchell, 9 Mees. & W. 15, 258
Brown v. Edgington, 2 Man. & G. 279, 334
Brownlie v. Russell, L. R. 8 App. Cas. 235, 205
Buck v. Seymour, 46 Conn. 156, 392

	Page
Calvert v. London Dock Co., 2 Keen, 638,	471, 472
Chouteau v. Allen, 70 Mo. 290,	258
Christmas v. Russell, 14 Wall. 69,	315
Clark's Exr. v. Trail's Admrs., 1 Metc. (Ky.) 35,	171
Clow v. Chapman, 125 Mo. 101,	483
Cook v. Long, 27 Ga. 280,	364
Cromwell v. County of Sac, 96 U. S. 51,	258
Cunard v. Francklyn, 49 Hun, 233,	411
Daniels v. Barney, 22 Ind. 207,	235
Dwight v. St. John, 25 N. Y. 203,	460
Easley v. Gibbs, 29 Iowa, 129,	282
Eaton v. Eaton, 37 N. J. Law, 108,	78
Elliott v. Pray, 10 Allen, 378,	501
Finney v. Cist, 34 Mo. 303,	450
Finney v. Condon, 86 Ill. 78,	474
Fitzgerald v. McClay, 47 Neb. 816,	155
Foot v. Card, 58 Conn. 1,	482, 484
Gebhard v. Parker, 120 N. Y. 33,	411
General S. N. Co. v. Rolt, 6 C. B. (N. S.) 550, 604,	472, 473
Gould v. Cayuga C. N. Bank, 86 N. Y. 75,	78
Gray v. Cox, 4 Barn. & C. 108,	334
Greenebaum v. Wheeler, 90 Ill. 296,	193
Gregg v. Wyman, 4 Cush. 322,	235
Hadley v. Baxendale, 9 Exch. 341,	97, 504
Handley v. Stutz, 139 U. S. 417,	278
Hart v. Stickney, 41 Wis. 630,	258
Haynes v. Nowlin, 129 Ind. 581,	484
Hill v. Winsor, 118 Mass. 251,	97
Hoe v. Sanborn, 21 N. Y. 552,	334, 335
Holme v. Brunskill, L. R. 3 Q. B. Div. 495, 505,	473
Illinois Ins. Co. v. Mette, 27 Ill. App. 324,	518
Irvine v. Lowry, 14 Pet. 293,	427
Jaynes v. Jaynes, 39 Hun, 40,	482
Jones v. Bright, 5 Bing. 533,	334
Jones v. Fales, 4 Mass. 245,	427
Jones v. Just, L. R. 3 Q. B. 197,	334
Kelley v. Whitney, 45 Wis. 110,	258
King v. Wight, 155 Mass. 444,	29
Knapp v. Swaney, 56 Mich. 345,	155
Knisley v. Pratt, 148 N. Y. 372,	82
Kohl v. Lindley, 39 Ill. 195,	335
Lancashire Ins. Co. v. Maxwell, 131 N. Y. 280,	250
Lincoln v. Norton, 36 Vt. 679,	171
Lindsey v. Leighton, 150 Mass. 285,	500
Lockard v. Com., 87 Ky. 201,	181
Logan v. Logan, 77 Ind. 558,	484
Long v. Young, 28 Ga. 130,	364
Looney v. McLean, 129 Mass. 33,	501
Miller v. Alliance Ins. Co., 7 Fed. 649,	519, 520
Miller v. Stewart, 9 Wheat. 680,	474
Moore v. Armstrong, 36 Am. Dec. 63,	171
Myers v. Burns, 35 N. Y. 269,	500
Nat. Bank v. Kirby, 108 Mass. 497,	258, 259
Newell v. Gregg, 51 Barb. 263,	258
Newton Nat. Bank v. Newbegin, 74 Fed. 135,	274
O'Maley v. Gas Light Co., 158 Mass. 135,	82
Palmer v. Hussey, 87 N. Y. 303,	390
People v. Van Ness, 79 Cal. 84,	114
Phillips v. Port Townsend Lodge, 8 Wash. 529.	450, 451
Platt v. Eggleston, 20 Oh. St. 414,	29
Prairie State Nat. Bank of Chicago v. U. S., 164 U. S. 227,	476
Price v. Price, 91 Iowa, 693,	484
Quinn v. Shields, 62 Iowa, 129,	337, 338
Railroad Co. v. Stout, 17 Wall. 657,	280
Randall v. Newson, L. R. 2 Q. B. Div. 102,	335
Reed v. Northfield, 13 Pick. 94,	501
Reese v. United States, 9 Wall. 13,	21, 474, 475
Remsen v. Hay, 14 Wkly. Dig. 443,	491
Richardson v. Tobey, 121 Mass. 457,	29
Riggs v. Pursell, 74 N. Y. 370,	460
Rodgers v. Niles, 11 Oh. St. 48,	335
Rogers v. Hosack, 18 Wend. 319,	315
Sailor v. Hertzogg, 2 Pa. St. 182,	364
Sample v. Hale, 34 Neb. 220,	155
Savage v. Mason, 3 Cush. 500,	29
Scott v. Stallsworth, 12 Ala. 25,	282
Scovill v. Thayer, 105 U. S. 143,	278
Shepherd v. Pybus, 3 Man. & G. 868,	334
Short v. Civil Township of White Lake, 8 S. D. 148,	4
Smith v. Railway Co., L. R. 6 C. P. 14,	97
Sparhawk v. City of Salem, 1 Allen, 30,	443
State v. Armstrong, 30 Neb. 493,	359
State v. Cobb, 64 Ala. 127,	258
Stevenson v. Insurance Co., 26 U. C. Q. B. 148.	520
Strohen v. Franklin S. F. Assn., 115 Pa. St. 273.	205
Sweeny v. Old C. & N. R. Co., 10 Allen, 368,	501
Thayer v. Boston, 19 Pick. 511,	417
Thorne v. Travellers' Ins. Co., 80 Pa. St. 15,	235
Towle v. American B., L. & I. Assn., 61 Fed. 446,	205, 206
U. S. v. Eckford's Exrs., 1 How. 250,	240
U. S. v. Hitchcock, 164 U. S. 227,	476

	Page
Vandervelden v. Chicago & N. W. R. Co., 61 Fed. 54,	78
Van Every v. Ogg, 59 Cal. 563,	450
Veeder v. Mudgett, 95 N. Y. 295,	278
Warren v. Warren, 89 Mich. 123,	481, 482, 484
White v. Case, 13 Wend. 543,	85, 86
White v. Miller, 71 N. Y. 118,	335
Whittaker v. West Boylston, 97 Mass. 273,	501
Wilcox v. Walker, 94 Mo. 88,	419
Williams v. Williams, 20 Colo. 65,	491
Wood v. Phillips, 11 Abb. Prac. (N. S.) 1,	422

STATUTES CITED BY THE COURT.

UNITED STATES STATUTES AT LARGE.

Vol. 11, p. 195. Land grant to Minnesota, 199
Vol. 14, p. 87. Same, 363
Vol. 21, p. 173. Transportation of dutiable goods, 407
Vol. 25, p. 667. Same — Port of Sault Ste. Marie, 407
Vol. 26, p. 131. Collection of customs revenue, 409

MINNESOTA CONSTITUTION.

Art. 1, § 8. Bill of rights, 481
——, § 12. Same—Exemption of property from execution, 327, 328
Art. 4, § 13. Legislature — Passage of bills, 170
——, § 27. Same — Subject of law to be expressed in title, 352, 355
Art. 4, § 33. Same—Prohibition of special legislation, 379, 382, 383
Art. 6, § 1. Legislature may establish inferior courts. 382, 383

MINNESOTA.

REVISED STATUTES 1851.

c. 70, § 74. Account—Bill of particulars, 410.

PUBLIC STATUTES 1858.

c. 60, § 54. Publication of summons, 243.

GENERAL STATUTES 1866.

c. 66, § 49. Service of summons by publication, 244
c. 66, § 105. Pleading—Relief after default or judgment, 301

GENERAL STATUTES 1878.

c. 46, § 3. Lien of debt of decedent on his real estate, 522
c. 66, § 8. Action upon a statute —Statute of limitations, 146, 147
c. 66, § 41. Action not to abate by death, 422, 423
——, § 64. Service of summons by publication, 244

GENERAL STATUTES 1894.

§ 6. General election, 283
§ 8. Same—Election districts, 123
§ 10. Formation of new election districts, 119, 123, 124, 125
§ 11. List of new districts to be published, 119, 123, 124, 125
§ 60. List of electors—Posting, 125
§ 186. Election contest—Notice, 122

MINNESOTA—Continued.

GENERAL STATUTES 1894—Continued.

§ 190. Same, 122
§ 191. Same—How heard and determined, 122
§ 194. Same—Evidence, 122
§ 359. Attorney General — Prosecution of offending corporation, 17
§§ 647–656. Change of county seat, 361
§ 647. Same—Petition, 361
§ 648. Same — Duty of county commissioners, 361
§ 651. Same—Election not oftener than once in 5 years, 361
§ 687. County commissioners — Claims to be audited, 1, 2, 3, 4, 5
§ 690. Same—Penalty for violation, 4
§ 692. Same—Creation of election districts, 120, 125
§ 730. County funds — Bonds of depositary, 112, 113, 114, 115, 238
§ 731. Same, 114, 238, 239
§ 989. Towns — Auditing accounts, 1, 2
§ 990. Same, 1, 2
§ 1775. Roads—Report to town meeting, 5
§ 1846. County roads, 5
§ 2012. Intoxicating liquors — Hour of closing place of business, 10, 11, 12
§ 2205. Weights and measures, 232, 234
§ 2212. Rate of interest, 163, 164
§ 2231. Dishonor of demand notes, 372, 373
§ 2248. Dangerous machinery to be fenced, 82
c. 33, §§ 2490–2532. Banks of discount and deposit, 270
§ 2498. Same—Increase of capital stock, 275, 276, 278
§ 2525. Same—Forfeiture of charter, 506, 507, 508
§ 2528. Same—Limit of indebtedness to bank, 506, 507
c. 34, tit. 1, §§ 2592–2617. Corporations empowered to take private property, 15
§ 2594. Same—Articles of incorporation—Filing proof, 194
§ 2606. Same — Eminent domain —Notice, 342
§ 2613. Same — Construction of road pending appeal, 342
§ 2615. Same — Effect of judgment, 347
§ 2645. Same—Power to acquire property, 346
§ 2685. Railway—Repair of highway crossings, 213, 216, 217
§ 2686. Same — What constitutes sufficient crossing, 216
§ 2706. Same—Stopping trains at railway crossing, 18, 21, 22
§ 2750. Same—Change of route, 340, 343, 344, 346
§ 3155. Insurance commissioner —Transfer of securities, 246, 249
§ 3157. Unauthorized insurance forbidden, 250
§§ 3331–3337. Insurance companies other than life, fire and marine, 246, 250
§ 3332. Same—Deposit of securities, 245, 247, 250
§ 3415. Corporations — Issue of stock at par, 224, 231, 276
§ 3674. Division of school district —Award of funds, 402, 403, 404
§ 4129. Chattel mortgage void unless filed, 290
§ 4209. Statute of frauds—Consideration, 101, 102, 103
§ 4210. Same—Sale of goods, 230, 231, 232
§ 4213. Same — Conveyance of land to be in writing, 101, 102, 103
§ 4233. Assignment for benefit of creditors — Assignee their representative, 288, 289, 291, 292, 293

MINNESOTA—Continued.

GENERAL STATUTES 1894—Continued.

§ 4240. Insolvent law of 1881—Assignee, 289
§ 4243. Same—Conveyance in anticipation of insolvency, 57
§ 4428. Wills — Legacy to subscribing witness, 335, 337
§ 4598. Guardian—License to sell real estate, 520, 521
§ 4807. Divorce—Alimony, 444, 447, 448
§ 5134. Statute of limitations—Action to recover real property, 362, 364, 365, 519
§ 5136, subd. 1. Same—Action upon contract, 259
———, subd. 5. Same—Action on the ground of fraud, 146, 147
§ 5138, subd. 1. Same—Action for certain torts, 146, 147
§ 5147. Same—Period of disability excluded, 169, 170
§ 5171. Action not to abate by death, 420, 422, 423
§ 5204. Service of summons by publication, 242, 243, 244, 245
§ 5246. Account—Bill of particulars, 410, 411
§ 5267. Pleading—Relief after default or judgment, 134, 301, 370
§ 5319. Garnishment — Supplemental complaint, 282
§ 5434. Action to set aside judgment for fraud, 136, 138, 140
§ 5510. Costs—Relator entitled to and liable for, 55
§§ 5629–5633. Washington county—Selecting jurors, 176, 178
§ 5630. Same, 179
§ 5660. Witness — Conversations between party and deceased person, 186, 302
§ 5662. Same — Privileged communications, 293, 298, 490
———, subd. 1. Same—Husband and wife, 302
§ 5689. Deposition—Certificate of officer, 37, 39
§ 5732. Certificate of officer that paper is not in his office, 200
§ 5734. Copy of paper in U. S. government office, 200
§ 5753. Land office receipt—Evidence of title, 200
§ 5754. Land office certificate of entry—Evidence of title, 200
§ 5757. Land office receipt—Evidence, 200
§ 5865. Landlord and tenant—Recovery of possession by tenant, 378
c. 76, §§ 5889–5911. Actions respecting corporations, 194, 508
§ 5900. Moneyed corporations—Sequestration, 506, 508, 509
§ 5901. Same—Forfeiture of charter, 506, 508, 509
§ 5902. Same—Receiver, 506, 508
§ 5903. Same—Action by creditor—Parties defendant, 506, 508, 509
§ 5904. Same—Supplemental complaint against stockholders, 506, 508, 509
§ 5905. Action by creditor against stockholders, 506, 509, 510
§ 5911. Same—Notice to creditors to exhibit claims, 508
§ 5913. Action for death by wrongful act, 395
§ 6041. Foreclosure — Redemption by mortgagor, 161, 162, 164, 165
§ 6042. Same—How made, 162
§ 6118. Forcible entry and unlawful detainer — Proceeding to eject tenant, 198, 449, 450, 451
§ 6127. Same—Form of verdict, 451
§ 6238. Mechanic's lien — Judgment for lien, 332
§ 6695, subd. 1. Forgery — False entries, 182
§ 6696. Same, 177, 181, 182

MINNESOTA—Continued.

GENERAL STATUTES 1894—Continued.

§ 6702. Same—Uttering forged instrument, 177, 182
§ 6762. Fraudulent issue of stock, 275, 278
§ 6842, subd. 5. Indictment—Intent to defraud, 182, 183
§ 6845. Same, 182
§ 7201. Grand jury—Discharge, 180, 181
§ 7395. Criminal proceedings certified to supreme court, 177

PENAL CODE.

§ 401. Forgery—False entries, 182
§ 402. Same, 181, 182
§ 408. Same—Uttering forged instruments, 182
§ 466. Fraudulent issue of stock, 275

SESSION LAWS (General).

1857, Ex. S. c. 1, § 7. Minnesota & Pacific R. R. Co.—Right of way, 389, 392
1864, c. 42. Service of summons by publication, 244
1869, c. 73, § 1. Publication of summons, 244
1872, c. 1, tit. 3, § 1. Unauthorized insurance forbidden, 250
1881, c. 123. Insurance other than life, fire and marine, 246, 250
——, c. 148. Insolvent law, 56, 288, 290, 291, 311, 457
——, ——, § 1. Same, 289
——, ——, § 4. Same — Conveyance in anticipation of insolvency, 57
1885, c. 19. Repeals provision G. S. 1878, c. 46, § 3, 522
1889, c. 91. Amends G. S. 1878, c. 66, § 4, 169, 170
——, c. 174. Act for changing county seats, 361
1889, c. 174, § 2. Same—Duty of county commissioners, 361
1891, c. 94, § 1. Amends Laws 1872, c. 1, tit. 3, § 1, 250
1893, c. 7, § 1. Dangerous machinery to be fenced, 82
——, c. 143. Creation of new counties, 352, 354, 355, 356, 357, 358, 359, 360
1895, c. 30. Amends G. S. 1878, c. 66, § 8, 146, 147, 148
——, c. 124. Amends Laws 1893, c. 143, 354, 355, 357, 358, 359, 360
——, c. 229. Municipal courts in cities under 5000. 379, 380, 381
——, ——, § 7. Same — Duties of judge, 381
——, ——, § 39. Same — Adoption of act, 382
——, c. 320. Entry of judgment notwithstanding verdict, 223, 318, 319, 435
——, c. 328, § 1. Struck jury, 165, 167, 168

SESSION LAWS (Special).

1865, c. 67, § 2. Cannon River Improvement Company, 15
1870, c. 118. Same, 15
1872, c. 111. Same, 15, 16
1875, c. 58. Same, 15
1879, c. 183. Chicago, St. Paul & Minneapolis Railway Company, 346
1881, c. 219. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 346

MINNESOTA—Continued.

SESSION LAWS (Special)—Continued.

——, c. 228. Same, 346
1883, c. 314, § 2. Washington county — Selecting jurors, 179
1887, c. 395. Hennepin county — Board of Court House Commissioners, 328
1891, c. 55, § 35. City of Duluth — Water and light bonds, 283, 284, 285
——, c. 381. Lake Minnetonka — Improvement of navigation, 414, 415, 416, 417

NEW YORK.

2 Rev. St. 1852, part III., c. 4, pt, 2, c. 5, § 158, p. 519. Account—Bill of particulars, 410, 411
Wait, Code, § 121. Action not to abate by death, 422

PROCEEDINGS

IN MEMORY OF

CHIEF JUSTICE RIPLEY.

The Honorable Christopher Gore Ripley was born September 6, 1822, in Waltham, Massachusetts, where his father, Rev. Samuel Ripley, was the settled Unitarian minister. His mother, who is said to have been one of the most remarkable women of the century in her intellectual attainments, was the daughter of Captain Gamaliel Bradford of Boston. The future chief justice was prepared for college by his parents, and graduated from Harvard College in 1841. He spent one year at the Harvard Law School, and then entered the office of Franklin Dexter, Esq., of Boston, a celebrated lawyer of that day. In 1855 he came to the then territory of Minnesota, settling first at Brownsville but removing to Chatfield in 1856, where he practiced his profession.

In 1869 he was elected Chief Justice of this court for the constitutional term beginning in January, 1870, but in April, 1874, he was compelled by failing health to resign. The remainder of his life was spent at Concord, Massachusetts, where in the "Old Manse" he died October 15, 1881.

The opinions of Judge Ripley begin in Volume 15 and end in Volume 20 of the Minnesota Reports.

On Wednesday morning, November 30, 1881, in behalf of the bar of Fillmore county, the Attorney General, Hon. William J. Hahn, presented to the Supreme Court the following report of proceedings had in the District Court of that county with reference to the death of Chief Justice Ripley:

At the general November Term of court begun and holden at the court house in the Village of Preston, County of Fillmore, State of

Minnesota, on the 9th day of November, A. D. 1881. Present Hon. John Q. Farmer, district judge, presiding.

At the opening of the court H. R. Wells, Esq., suggested the decease of Hon. Christopher G. Ripley, late Chief Justice of this state, and that such action be taken as will show the high esteem in which the deceased was held by the court and the members of this bar. Whereupon, the court appointed H. R. Wells, N. P. Colburn and J. R. Jones, a committee to draft appropriate resolutions of respect. After fitting remarks by the members of the bar and court, the committee reported as follows:

"To the Honorable the District Court of Fillmore County, in General Term.

"Your committee respectfully report:

"Whereas, the Honorable Christopher Gore Ripley, an honored member of our bar from 1856 until he was called to the responsibilities of Chief Justice of this state, in 1870, departed this life at his residence in Concord, Massachusetts, on the 15th day of October, 1881, as a tribute of our respect for his memory and in appreciation of his worth, we present the following:

"First. That from long and intimate association with the deceased we bear sincere and earnest testimony to his fidelity to every trust. He was a genial associate and a true friend, obedient to every requirement of society, cheerfully acceding to its calls and anticipating its demands. He loved truth and hated oppression. As an attorney he endeavored to protect the weak and to promote justice. As a judge he illustrated the qualities of mind and heart essential to, and exalting, his high office.

"Second. Sharing his confidence and regard, his friendship has endowed us with pleasant memories, but his loss fills our hearts with sorrow.

"Third. That these proceedings be engrossed and made a part of the records of this court.

"That authenticated copies thereof be forwarded to the Attorney General of this state, to be by him brought to the attention of the Honorable Supreme Court, also to the widow and family of the deceased at her residence in Concord.

H. R. Wells,
"N. P. Colburn,
"J. R. Jones,
"Committee."

November, 1881.

Ordered: That the proceedings be engrossed and made a part of the court records.

JOHN Q. FARMER, Judge District Court.

Thereupon in behalf of this court ASSOCIATE JUSTICE BERRY responded as follows:

"The proceedings of the bar of Fillmore county which have just been presented as a tribute to the memory of Chief Justice Ripley

are the more significant, because they are the testimony to his learning and worth of those whose opportunities for knowing him were of the best—the testimony of his professional brethren among whom he was engaged in the practice of the law for more than fifteen years, and among whom he resided during the four years of his judicial service. They doubtless express not only the sentiments of the bar, but the general regard and esteem in which he was held by the entire community in which he dwelt, as a learned and skillful lawyer, a wise counsellor and an honorable, courteous and upright man.

"Coming into southeastern Minnesota in the infancy of its settlement, he was brought by professional and other business relations in contact with a large proportion of the early settlers, so that there was hardly a man among them of any, even local, prominence who did not know him.

"In a new settlement, into which every man comes almost as a stranger, there is, as many of us can bear witness from personal observation, a prevailing feeling of mutual dependence and a sense of obligation for kind offices which, to a considerable extent, disappear as the country grows older and people are more able to depend upon themselves. But, for the years during which it lasts, this feeling of dependence brings men very closely together and affords them unusual opportunities for forming estimates of character and ability which are seldom mistaken, and the resulting likes and dislikes are ordinarily well-founded and lasting. This is well exemplified in the case of Judge Ripley. No man in that part of the state made more, warmer, or firmer friends, especially among the early settlers, than he did by his cheerful readiness to do a public service or a private kindness, and by his entire reliability in every matter of business or duty.

"My own personal acquaintance with Judge Ripley substantially began when he became a member of this court. After that time we were brought together almost constantly during the terms of court, and at the meetings held in vacation for consultation. He was a most delightful companion, not only on account of the extent, variety and accuracy of his information, his knowledge of men and affairs, his large fund of anecdote, his fresh, genial and abounding wit and humor, but equally on account of his unfailing courtesy, his unaffected modesty and his genuine kindness of heart.

"He was well descended, and his advantages in youth and early manhood were uncommonly great. His father was a Unitarian minister of high repute in the days of Channing, and his mother the most learned woman of her time. He was born and reared at a period of great intellectual activity in New England, when questions of high import, theological, literary and scientific, were familiarly discussed at the fireside. A critical observer and an incessant and thoughtful reader, he failed not to profit by his opportunities.

"As one marked result his familiar and unstudied conversation, aided by a ready and retentive memory, was instructive and entertaining to a degree which those whose privilege it was to enjoy it can never forget.

"As a judge he was animated with the highest sense of the sacredness of the judicial function, and with an ardent desire so to administer the law as to do equal justice between man and man. He brought to the discharge of his official duties much learning, and all the application by study and thought of which he was capable. No man ever questioned the purity of his intentions or his unspotted integrity of purpose. To his associates upon the bench he ever manifested, both in public and private, the same unassuming modesty and considerate kindness and courtesy which always characterized his relations to the bar.

"I speak for my brother McMillan, as well as myself, in saying that we look back upon our association with Judge Ripley upon the bench of this court with the most gratifying recollections.

"To this inadequate tribute to the memory of a good man it only remains for me to add that, after his impaired health compelled him to resign his judicial office, he returned to Concord, Massachusetts. There he died on the 15th day of October last, at the age of 59, among the friends of his youth, having received during a long and patiently-endured illness of seven years the devoted care of his most estimable wife, of his surviving sisters, and of other near and affectionate relatives."

Whereupon it is ordered that said report of the proceedings had in the District Court of Fillmore County, together with the response thereto, be entered at length upon the records of this court.

PROCEEDINGS

IN MEMORY OF

CHIEF JUSTICE McMILLAN.

On the afternoon of Thursday, November 15, 1897, in the Supreme Court room at the state capitol, Hon. George Brooks Young, as chairman of a committee of the Bar of the state, presented to the Supreme Court, then in session, the following memorial of Chief Justice McMillan, and moved that it be entered upon the records of the court.

MEMORIAL.

To the Honorable the Supreme Court of the State of Minnesota:

The members of the Bar of the State respectfully offer to the Court, for preservation in its records, this memorial of their respect and affection for the Honorable Samuel J. R. McMillan, who for many years filled the offices of Associate Justice and Chief Justice of this Court with an integrity, learning and ability that were never brought into question, and with a kindly courtesy which has endeared his memory to all who knew him.

As District Judge, and as Associate and Chief Justice of this Court, and as a Senator of the United States for twelve years, he illustrated in those various stations all the virtues of a just judge, of a wise and patriotic statesman, and of a sincere and consistent Christian. In his death our profession has lost a most distinguished member, and the community in which he lived, and our State which he served so long and so well, one of their most eminent and upright and beloved citizens.

In our own deep sorrow for the death of our beloved friend and brother, we tender to his family our sincere condolence in their great bereavement.

Judge Young then addressed the court as follows:

"May it please the Court:

"It is now nearly twenty-three years since Chief Justice McMillan presided in this court. It is more than ten years since he retired from public life. Of the present members of the Bar many—perhaps most—never argued before him in this court. With them his judicial reputation rests on his reported opinions and on the report of the elder members of the profession. Even to them he needs no eulogy, and the memorial in which they have joined, and which it is my high privilege to present to the court, expresses the respect and affection in which Judge McMillan was held by all the members of the Bar. But as one of those who practiced before him and was for a brief time his associate in his judicial duties, and who was honored with his friendship, I desire to add a few words touching his life and character as they appeared to those who knew him best.

"Samuel James Renwick McMillan came of Scottish ancestry, and was born in Brownsville, Pennsylvania, February 22, 1826. He received a liberal education, and was graduated from Western University of Pennsylvania in 1846. Having studied law, he was admitted to practice in 1849. He removed to the then territory of Minnesota, in 1852, settling at Stillwater. Upon the admission of Minnesota as a state, he was chosen Judge of the District Court of the First Judicial District. In that office, which he held till 1864, he gained an enviable reputation. I have been told by those whose practice in our courts covered that now remote period (among others by the late Gordon E. Cole, than whose opinion on this point none could be higher) that the state never had his superior as a district judge. In 1864, on the resignation of Judges Atwater and Flandrau from the bench of this court, he was one of the two associate justices appointed to succeed them. The appointment met with universal approval, and in 1864, and again in 1871, he was elected to the same office. In April, 1874, on the resignation of Chief Justice Ripley, he was appointed Chief Justice of this Court, and again the choice of the Governor was approved by the people, and in November, 1874, he was chosen Chief Justice for the constitutional term. At the next session of the Legislature he was elected a Senator from Minnesota in the Congress of the United States, and in March, 1875, resigned the office of

Chief Justice. In 1881 he was again elected Senator, and continued such until March, 1887. For many years he was a trustee of the State Reform School. From March, 1887, until the illness which resulted in his death he was engaged in the practice of the law in this city.

"The opinions of Judge McMillan in this court begin in Volume 9 and end in Volume 21 of the Minnesota Reports. They are characterized by ample learning, a clear comprehension of the questions involved, a firm grasp of legal principles, a terse and lucid expression. They usually go to the heart of the matter, to the real merits of the case, unless the presentation of it made this impossible. There is no parade of learning or acuteness, no attempt to appear wiser than his predecessors, no yielding to the temptation to decide questions not really involved—to decide too much. But there is no weakness, no paltering, no attempt to evade questions that called for decision. They are replete with that judicial wisdom which is better than mere legal learning or dialectic skill. They exhibit him as the fearless, wise, clearsighted, prudent and careful judge.

"As a senator of the United States he exhibited the same high qualities which characterized him in the judicial office. With strong political convictions and local attachments, his patriotism and statesmanship were yet broad enough to embrace the whole country and all its citizens. He was not and never aimed to be a party leader. He early won and always retained the respect and confidence of his fellow senators without regard to party; he was entrusted with the chairmanship of important committees, and the charge of important legislation, and proved himself a wise, judicious and faithful senator.

"It was my own great good fortune to enjoy a friendship and intimacy with Judge McMillan, which, beginning in an official association early in 1874, continued until his death. No one could know him well without recognizing that his was a character of the highest type. The man was more than the jurist or the statesman. He was free from all self-seeking. While not careless of the approval of his fellow men, it was the approval that follows worthy actions, not that which is sought after, that he valued. His disposition was amiable, modest and retiring. He had a kindliness of manner as gracious as it was sincere, a humility as genuine as unobtrusive, a

smile that was a benediction, and a heart open as day to melting charity.

"Yet he would be much mistaken who should have inferred from this amiability of disposition that Judge McMillan was a man of weak character or timid spirit. He had the unflinching courage, the unbending and uncompromising devotion to duty of those heroic Scottish Covenantors whose blood flowed in his veins and whose faith he had inherited. Over his grave as over that of John Knox might it be said: 'There lies one that never feared the face of man.' To him the judgments of men were as nothing in view of the eternal and immutable decrees on which, as he believed, the fate of all mankind depends. Except for their outward austerity, their uncouthness and their extravagances, he was a Puritan such as Macaulay depicts them in his famous essay on Milton. Had his lot been cast in the seventeenth instead of the nineteenth century, he might well have been among those

" 'Who sat with Bibles open around the Council board
And answered a King's missive with a stern—Thus saith the Lord.'

"And he would, I believe, have sealed his faith with his blood as fearlessly as any in the roll of martyrs commemorated by the historic tablet in the old Greyfriars Churchyard in Edinburgh—a roll which ends with a name which he himself bore—James Renwick.

"And with their rock-ribbed strength of character, he had a sweetness that was all his own. Himself living as ever in his Great Taskmaster's eye, no man was less disposed than he to sit in judgment on the frailty or the failings of others.

"In placing and maintaining such a man in the highest offices for nearly thirty years, our state, while it honored him, honored itself yet more. His life was a daily teaching of every public and private virtue. He has left to the profession and the public a shining example of great merit crowned by the unsolicited bestowal of great civic rewards; and to his family and his intimates the blessed memory of the just, and, in their deep affliction, the solace of those celestial hopes that spring from the grave of the upright man."

Hon. Thomas Wilson then addressed the court as follows:

"It was my good fortune to become acquainted with Judge McMillan when we were both young men. Our acquaintance soon ripened into intimate, confidential friendship, that lasted unclouded until his death. That friendship has been one of the great pleasures of my life, for he was a true friend and no ordinary man.

"He came to Minnesota while it was a territory, and he practiced his profession until he took his place on the bench, when the state was admitted into the Union. The business of the lawyer at that time was neither abundant nor important. After his first election he remained continuously on the bench of either the District or the Supreme Court until he was elected to the United States Senate, in 1875. After leaving the Senate he never was very actively engaged in practice.

"I shall not say aught of him beyond the plain, simple truth. If he hears what we say to-day, that would please him best. There have been and are in our profession many who would outrank him, either as a jurist or as an advocate. But he was an able lawyer. In natural ability, learning and sound judgment, he deservedly stood very high. He was, if I may be permitted the expression, healthy-minded,—without isms, or hobbies, or any deforming idiosyncrasies. As a judge he was not the equal of some of the great jurists of our country—few attain to their stature—but he was in every respect far above mediocrity. He was not only an able, learned and sagacious lawyer, but he had in a notable degree those other attributes and qualities that are equally essential to a good judge. Every party, before him, had a courteous, attentive, patient hearing. No matter how trifling the sum involved, he never consented to a decision without the most careful investigation and consideration of every question of law or fact that could affect the result. Every case, to him, was important. While his sympathies were always with the poor, the needy and the defenseless, he was too good and too just a judge to be a respecter of persons, well knowing that justice, irrespective of class or condition, is the only safeguard of the rights and liberties of the citizen. He had a feeling of contempt for either the parasite or the demagogue, and for all those 'miserable aims that end in self.' I verily believe—and no one had a better opportunity to observe than

I—that on the bench the question never occurred to him whether any act or decision of his would please or displease any person or class, or how it might affect himself. To my mind man is not endowed with a nobler attribute than courage. The Romans, not inappropriately, styled it virtue. That virtue Judge McMillan possessed in a marked degree. While he was gentle, mild-mannered and devoid of demagogism, he was absolutely fearless in the performance of his duties. He did no act to be seen of men. Whatever he deemed it his duty to do he did unostentatiously, but unhesitatingly and fearlessly. He was always willing to be shown his error and took pleasure in admitting and correcting it, which is a degree of magnanimity that no essentially little mind possesses.

"He was a Republican without qualification or mental reservation, accepting the most extreme doctrines of the party, but he was not in any sense a politician. He did not know how, nor had he any inclination, to resort even to those arts and methods that are allowable to a man who seeks popular favor. His success in obtaining judicial preferment was due solely to his admitted fitness and his high character. Until the session of the legislature at which he was chosen United States Senator was convened, I do not remember that he was spoken of as a candidate, and I think I know that he had neither hope nor thought of his election, until it appeared probable that neither of the candidates who were actively seeking the place could be elected. He owed his election at that time to two influences—the confidence of the members of the legislature in his integrity, and the confidence of the politicians that he did not understand, and, even if he did, would not resort to, the methods and practices which are often found to be necessary for political success, and that, therefore, he would be the more easily displaced. As the sequel showed, both judged correctly, for he left the Senate with a well earned reputation of having been a conscientious, industrious and able senator, and without any knowledge of practical politics.

"He was in no sense a man of the world or a money-getter. He was in all his doings conscientious, single-minded and artless, and as pure as a girl in thought, word and act. With his friends and intimate acquaintances he was a genial, frank, jovial companion. A Presbyterian from his youth up, he accepted the creed and doctrine of that

church and, with an unfaltering faith, such as in these times of agnosticism is very rare, he every day modestly and unassumingly did that which was right as God gave him to see the right.

"I never knew a man of whom it could be said more truthfully that he lived up to the admonition of those beautiful lines of Thanatopsis:

> " 'So live, that when thy summons comes to join
> The innumerable caravan which moves
> To that mysterious realm, where each shall take
> His chamber in the silent halls of death,
> Thou go not, like the quarry-slave at night,
> Scourged to his dungeon, but, sustained and soothed
> By an unfaltering trust, approach thy grave
> Like one who wraps the drapery of his couch
> About him, and lies down to pleasant dreams.'

"The influence of our departed brother is not inurned with his body, for 'example acquires authority when it speaks from the grave.' Until the last record is made up, none can tell how many have been made better and braver and truer men by his example."

Godfrey Siegenthaler, Esq., then addressed the court as follows:

"May it please the Court:

"In the death of our lamented friend and brother, Judge McMillan, one of the highest, noblest, purest, most useful, and at the same time most unpretentious, careers has been closed. That the praise I have bestowed and shall bestow upon him here may not seem at random, or unadvised, I will state that mine has been the honor and privilege to know him as a friend for more than thirty-two years, and that, during this period, I have had ample opportunity to form a fair basis for my estimate of his life and character.

"To have seen him in his daily walk of life was to respect him. To have known him more or less intimately was to love him. To have observed with what fidelity, integrity, and signal ability he discharged the duties of high official stations was to admire him. And to have heard him while Supreme Court Judge, Chief Justice, United States Senator or Lawyer, in the House of God, offer up to the Almighty a simple fervent prayer, of thanks for blessings received and

for the welfare of mankind, was to arouse, in the infidel as well as the Christian, a feeling of reverence, not only for him individually, but also for the religion of which he was generally admitted to have been a devout, consistent and exemplary follower.

"To show what was thought of his exemplary Christian conduct, even among the irreligious, I will relate an incident which came to my notice. While he was yet an Associate Justice of the Supreme Court in the later sixties, I happened one day to meet several non-Christians engaged in discussing the doings of a certain church member who had not lived up to his religious professions. One of them, after having denounced this man as a hypocrite and a disgrace to his church, said: 'But there's Judge McMillan. If every church member were like him, I'd like to become one myself. He is an honor to any church.' To this compliment the rest of the party assented.

"Like all mortals, he was sometimes criticised; but the critics soon discovered that, while they had been looking at the matter in question in the light of the moon, he had gazed at and acted upon it in the light of the sun.

"To those who, like myself, were admitted to the bar of the Supreme Court while he was one of its able and honored justices, to young practitioners at the bar and to young men generally with whom he came in contact, he was especially endeared, because of the wise counsel and kindly encouragement which he had given them, and the continuous interest he took in their welfare. Indeed one of the principal reasons for his great and surprising popularity during his long official career was his kindly and sympathetic treatment of all persons, high or low, rich or poor, whom he met, so that when they left him, it was with the conviction that he was their friend.

"Doubtless you have all seen and admired last summer, at our beautiful Como Park, the majestic yet humble Victoria Regina, with its sturdy stem, its large circular leaves, and a blossom—a lovely blossom—resting upon the water as if, in sheer modesty, it sought to hide itself beneath the surface. This gem of the floral creation is, in some respects, symbolical of the life of our departed brother. In its harmonious structure, we behold his moral grandeur and Christian meekness; in its sturdy stem, his tried ability; in the huge circular leaves, his great and general usefulness; in the all-permeating sap, his in-

tegrity, and in the blossom, his rare and exemplary piety. In the poetic language (slightly altered by me) of an old English author, I say of our departed brother: He was a judge—

"A man so learned,
So full of equity, so noble, so notable;
In the process of his life so innocent;
In the manage of his office so incorrupt;
In the passages of state so wise; in
Affection of his country so religious.
In all his services to the state so
Fortunate and exploring, as envy
Itself cannot accuse, or malice vitiate.

"He is gone to his long home! But, as the waters of the mighty Mississippi, flowing by this city toward the Gulf of Mexico, are recalled by the voice of nature to bedew, to besprinkle, and to nourish the famished soil, so memory will bring back to us the kindly features of our lamented friend to influence our hearts for higher and nobler aims and for simple, blameless lives."

Hon. Henry J. Horn then addressed the court as follows:

"My acquaintance with the late Judge and Senator McMillan began in 1855,—the time of my first residence in Minnesota. I was intimate with him down to the time of his death.

"I unreservedly concur in the memorial and expressions of the bar as to his worth and ability as a lawyer, judge and senator, and in the approbation and esteem entertained for him by the citizens of the State of Minnesota.

"I found him in 1855 a hard-working, conscientious and indefatigable member of our profession. He soon acquired a position at the bar which won him judicial honors, first as Judge of the District Court, and at last as Chief Justice of the Supreme Court,—the highest judicial position in this state,—leaving his judicial office only to accept the exalted position, tendered to him without solicitation, of United States Senator.

"His long official career has ever been characterized by an honorable, able, exacting and successful discharge of his public duties with-

out blemish, or even suspicion. He was a modest and unpretending man throughout, though always firm and decided in the performance of duty. In his elevation to high judicial and civic positions he never abated the observance of those duties, private or public, which he owed as a citizen, or as a friend, neighbor or Christian.

"His career begins prior to the commencement of our statehood, and he belongs to that class whose characters, acts and examples are intimately connected with the upbuilding of the state, and have become part of its history.

"The Bar of Minnesota is also privileged to claim such men as Judge McMillan as examples of what a true lawyer should be, and the honor that may await him in the end.

"While we, his professional brethren, deplore his loss, and sympathize with his family and friends in their sad bereavement, it is a source of satisfaction that his illustrious name and character have conferred signal honor on our profession."

Remarks were made also by Hon. John B. Sanborn, at the conclusion of which the following responses to the addresses of the bar were made in behalf of the court.

ASSOCIATE JUSTICE COLLINS then said:

"I deem it a privilege to join in the tributes of love and respect paid on this occasion to the memory of one who, for many years, held high judicial position in this state, first as a District Judge, then as an Associate Justice, and finally as Chief Justice of the Supreme Court; and who later, and for two terms of six years each, filled the responsible position of United States Senator. It is well known that, for a long time in our early history, Judge McMillan was a very prominent and distinguished citizen holding these high judicial and political positions, which he filled with great credit to himself and to the perfect satisfaction of the people who honored him, and to whose service he gave the best years of his life. So zealous was he in the proper discharge of his official duties that he paid little or no attention to private business, and, while others of his profession availed themselves of the many opportunities in the early days to

accumulate wealth, he lived and died in very moderate circumstances. I first knew him in the spring of 1862 when he, as Judge of the First District, held court at Hastings. My acquaintance was limited, and I am not qualified to speak of his career in that position. I can only say that he had the reputation of being an exceedingly careful and painstaking officer. His work while sitting as a member of this court is found in 13 volumes of our reports and fairly illustrates the character and ability of the man. Every decision tells of his loyalty to the work in hand, of his determination to be thorough in his investigation, and of his fidelity to well settled principles of our jurisprudence.

"As a member of the legislature of the 1881 session, I had the pleasure of voting for him when he was re-elected to the Senate. It was a place which was never so satisfactory to him as a position on the bench. While we cannot say that he was a leader at Washington, all know that he was held in great esteem by his associates and occupied an enviable place in their councils.

"Judge McMillan was an excellent example of noble manhood. He was unassuming upon all occasions, and perhaps too much so for his own welfare. He was upright in every sense of the word. His faithfulness in public life was never questioned, and as a private citizen he was most loving and lovable. His career was not one to attract widespread attention, but it commends itself to us as a striking example of what may be accomplished by a man of dignified modesty and true worth. His was the life of a Christian gentleman, and when the hand of death, after nearly forty years of active life in this state, was laid upon his worn-out body, not one man within our borders could say aught against him."

ASSOCIATE JUSTICE MITCHELL then said:

"Having been intimately acquainted with Judge McMillan for nearly thirty-five years, I not only entertained the highest respect and admiration for him as a man and a citizen, but had also formed a very warm attachment for him as a personal friend. I should therefore be derelict in the performance of duty, if I should permit this occasion to pass without paying tribute to his memory.

"I am gratified, both as a member of this court and as his friend, to hear such high and evidently heartfelt commendations of his noble character from those who knew him best, in all of which I heartily and fully join.

"In emphasizing the nobility of his character we may perhaps seem to have partially lost sight of its strength. There was nothing weak in Judge McMillan's character.

"Modest in the estimate of his own ability and charitable toward the opinions of others, he was never obtrusive in asserting himself; but he was a man of decided and positive convictions, and he had the courage to assert them when duty required; and he always lived up to them. Unless a man displays an inordinate degree of egotism, the world is very apt to accept his own estimate of himself as correct. If Judge McMillan had been dogmatic and aggressive in the assertion of his views, people generally might have placed a higher estimate on his talents. Only those who knew him well were in position fully and correctly to appreciate his ability and strength of character. By his death this city and state have lost one of their best and most eminent citizens, whose memory will always be honored and revered by all who knew him."

CHIEF JUSTICE START then said:

"Gentlemen of the Bar:

"Your Memorial happily expresses the sentiments of the court, with reference to the life, character and public services of Chief Justice McMillan. As Judge, Chief Justice, and Senator in the Congress of the United States, he rendered distinguished services, which entitle him to grateful remembrance by the whole people of the state. He quietly discharged the duties and responsibilities of private and public life with rare ability, fidelity, courage and manly vigor. He was a just, gentle, sincere, wise man, 'Who reverenced his conscience as his king.'

"It is proper as a tribute to his memory that your memorial be spread upon the records of the court for the day, and that the court now adjourn. So ordered."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

OLD SECOND NATIONAL BANK OF AURORA v. TOWN OF MIDDLETOWN.[1]

December 24, 1896.

Nos. 10,187—(151).[2]

67 1
f83 517

Action against Town—Auditing Board—Filing Claim.

G. S. 1894, §§ 989, 990, provide that the supervisors constitute a town board for the purpose of auditing all accounts payable by said town; and section 687 of said statutes provides that "before any account, claim, or demand against any town or county of this state, for any property or services for which such town or county shall be liable, shall be audited or allowed by the board of officers authorized by law to audit and allow the same, the person in whose favor such account, claim or demand shall be, or his agent, shall reduce the same to writing in items, and shall verify the same to the effect that such account, claim or demand is just and true, that the money therein charged was actually paid for the purposes therein stated, that the property therein charged was actually delivered or used for the purposes therein stated, and was of the value therein charged." *Held*, that the filing of an itemized and verified claim against the town with the auditing town board was a condition precedent to commencing an original action thereon against such town.

Appeal by plaintiff from an order of the district court for Jackson county, P. E. Brown, J., sustaining a demurrer to the complaint. Affirmed.

[1] Reported in 69 N. W. 471.

[2] October, 1896, term.

Andrew C. Dunn, for appellant.
T. J. Knox, for respondent.

BUCK, J. Demurrer to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and plaintiff brings this appeal from the order made thereon.

The action is brought by the plaintiff on a claim duly sold and transferred to it, to recover the agreed price of certain scrapers ordered and received by the defendant town for its use in the construction and repair of its roads and highways. The complaint shows the corporate character of the plaintiff, the defendant, and the assignor of the plaintiff, the making and delivery by the duly-authorized board of supervisors of the defendant, on May 31, 1892, to the assignors of the plaintiff, of an order for three wheeled scrapers, at the agreed price of $127, to be shipped to the address of one of said board, from Aurora, Illinois, to Jackson, Minn. The order also contained an express promise to pay to the wheel company of Aurora, to whom it was addressed, or its order, $127, the sum of the price of the scrapers, payable on or before May 1, 1893, with 8 per cent. interest from date of shipment until paid, at the Jackson Bank. The order and promise are set out in full, and were duly signed by all the members of the board of supervisors, the allegation being positive that they were "duly authorized" to make it. The shipment of the goods in compliance with the order, and their due receipt by the defendant, are alleged, together with the allegation that:

"The said scrapers so ordered and received were ordered and received by the defendant for the purpose of being used, and were used, in the construction and repair of the roads and highways of said defendant town, with the construction, maintenance, and repair of which roads and highways said town was lawfully charged."

The due sale or transfer of said claim to the plaintiff, and nonpayment by the defendant, are alleged in the complaint, and judgment is asked for said amount, with interest from June 1, 1892, the date of alleged shipment under the terms of the order.

The main point upon which the trial court seems to have sustained the demurrer was the fact that the claim was not filed for audit under G. S. 1894, §§ 687, 989, 990. The first section quoted, viz. 687, especially provides that:

"Before any account, claim or demand against any town or county of this state, for any property or services for which such town or county shall be liable, shall be audited or allowed by the board of officers authorized by law to audit and allow the same, the person in whose favor such account, claim or demand shall be, or his agent, shall reduce the same to writing in items, and shall verify the same to the effect that such account, claim or demand is just and true, that the money therein charged was actually paid for the purposes therein stated, that the property therein charged was actually delivered or used for the purposes therein stated, and was of the value therein charged."

We are of the opinion that the controlling rule to be applied in this case exists by virtue of the terms of the statute itself. If a cause of action exists, its enforcement is suspended until certain conditions are complied with. The owner of the claim is not deprived of his remedy for collecting it; but the statute points out a way or remedy which he must first pursue, or else the town is not primarily liable to an action upon the indebtedness. The claim must be itemized and verified. The property bought must be actually delivered for the purpose stated, and of the value charged. So prepared, the claim must be filed before any liability attaches. Towns have a right to purchase and hold such personal property as may be necessary for the exercise of their corporate or administrative powers. But this power is conferred by statutory law, and probably they have such implied powers as are necessary to enable them to exercise the powers expressly granted; and coupled with these powers is the one that any account, claim, or demand arising against any town must be itemized, verified, and filed with its board before it can be audited, and before a liability shall arise against such town. He who deals with the town does so with notice of the rights and obligations created and remedies existing. These provisions for filing and auditing claims are made in furtherance of a public policy to prevent needless litigation, and to save unnecessary expenses and costs, by affording an opportunity to amicably adjust all claims against municipal corporations before suit is brought. 2 Dillon, Mun. Corp. (4th Ed.) § 937. It is competent for the legislature to suspend the claimant's right to bring suit until he has first presented his claim to the auditing board.

It is contended, however, by the appellant's counsel, that this rule is inapplicable to the filing of claims with the board of town auditors,

because, under this statute, no appeal is authorized from the allowance or disallowance of such claim. But we have no hesitancy in saying that in such case, where the claim is properly presented to the town board, and it disallows or refuses to take any action therein, the holder may then commence an action against the town for the amount of the claim. The condition precedent to the enforcement of a township liability to an action for any account, claim, or demand depends, as we have stated, upon its being properly itemized, verified, and filed; but when the claimant has complied with these conditions, and the town refuses to pay the claim or act upon it, then a cumulative remedy arises, and he may sue as upon an original action, as by statute each town has the power to sue and be sued.

In Murphy v. Commrs. of Steele Co., 14 Minn. 51 (67), it was held that where a claim was allowed in part, and the balance disallowed, an original action was permitted, and the claimant not restricted to his remedy by appeal, although such appeal was authorized by statute. Certainly, as strong, if not stronger, reasons exist why such an original action may be brought upon a claim disallowed by the town board, or where it refused to act, than in case of the county board, because in the latter case an appeal from such disallowance or refusal to act is authorized.

Counsel for appellant places great reliance upon the case of Short v. Civil Township of White Lake, 8 S. D. 148, 65 N. W. 432. That case is not in point, because it is based upon a statute of that state entirely different from ours, and which expressly provides that, in case of controversies or causes of action existing between a town and an individual, an action at law or equity may be had for the purpose of trying and settling such controversy or action, and the action is to be conducted as in other actions between individuals. The distinction between the statute of South Dakota and ours is so manifest that no discussion is needed. Not only is ours prohibitory to the extent to which we have stated, but section 690 thereof provides that any member of such auditing board who shall audit and allow any account, claim, or demand so required to be itemized and verified without the same having been first duly itemized and verified, shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding $500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The severity of this penalty indicates how important the legislature deemed the itemizing and verifying such claims to be. The items of an account would the more readily enable the board to detect fraud or mistake, and the verification would subject the claimant to prosecution in case of perjury. These requisites, therefore, constitute material safeguards in behalf of the town against fraudulent or unjust claims.

Where, as in this case, the exact property and amount to be paid therefor have been agreed upon, and the time of payment fixed, by the parties, it may, perhaps, be urged with some plausibility that no such necessity exists for itemizing, verifving, and filing the claim; but the town can yet find its best safety and protection in requiring the claimant to show by his itemized and verified claim, duly filed, that he has truly performed his part of the obligation, in accordance with his agreement, and in the manner required by law. The law appears not only to be mandatory, but of great benefit to the public.

The question of whether the township supervisors are authorized by law to create an interest-bearing indebtedness against their town, payable at a future day, is not properly before us. The liability of the town does not arise upon the mere fact that its supervisors gave the written obligation set out in the complaint, but upon the ground that the defendants, having the power so to do, ordered and received the said scrapers, for the purpose of being used, and they were used, in the construction and repair of the roads and highways of said town. Such supervisors are by law charged with the care and superintendence of roads in their towns, and required to keep not only the town roads, but the county roads in their towns, in repair. G. S. 1894, §§ 1775, 1846. Having ordered, received, and kept these implements, the town is liable for their value, either upon express or implied contract, according to the evidence as it may appear; and it cannot escape payment for the value thereof upon the assumption that the order or obligation given was not technically binding. It is not the order upon which the action is brought, as we ordinarily bring an action upon a promissory note or bill of exchange. The gist of the action is for goods ordered and received by the defendant, and by it used for a lawful purpose, and for which, in law and equity, it should pay. We do not regard the order given

as creating the liability alone, but the receipt of the scrapers which were appropriated by the town for its use after giving the order creates the liability. The goods received were purchased and used for a purpose clearly within administrative power of the supervisors, and reasonably essential for the attainment of such purpose. But, as the appellant failed to file with the board of audit an itemized and verified claim, the action was prematurely brought, and the order sustaining the demurrer affirmed.

So affirmed.

JOHN R. HAMMARGREN v. CITY OF ST. PAUL.[1]

67 6
82 410

December 24, 1896.

Nos. 10,203—(171).

Defective Street—Evidence—Repairs after Accident.

The plaintiff, against objection, was permitted by the trial court to introduce evidence tending to prove that the defendant city had, subsequent to the time of the personal injury sued for, repaired the defective place in the sidewalk where the injury was sustained. *Held* error.

Appeal by defendant from an order of the district court for Ramsey county, Egan, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $3,000. Reversed.

Edward J. Darragh, for appellant.

Chamberlain & Anderson, for respondent.

BUCK, J. Action for personal injuries alleged to have been sustained by reason of a defective sidewalk on Burr street in the city of St. Paul. Verdict for plaintiff, and appeal from an order denying appellant's motion for a new trial.

The motion was based upon affidavits of newly-discovered evidence and the admission of incompetent evidence. The sidewalk where the injury occurred was built of plank, one of which had become rotten, thus leaving a hole in the sidewalk. During the trial the plaintiff sought to show, by the testimony of one of his wit-

[1] Reported in 69 N. W. 470.

nesses, that the hole where the accident happened was soon thereafter fixed and repaired; and this attempt was accomplished by a statement of plaintiff's counsel that his object in doing so was to identify the hole, and that such hole was the only place in the sidewalk which had been fixed. This evidence was admitted against the objection of the defendant. The court, in doing so, stated that he would allow it, but would not give any reason for doing so. We are of the opinion that the admission of this evidence was error.

The defendant had not claimed that there was any other hole in the sidewalk which might have produced the injury. The answer was a general denial, and, of course, put in issue the existence of the hole or defect alleged in the complaint. The accident happened on the sidewalk built on the west side of Burr street, between Jessamine and Geranium streets, and about 50 feet from the last-named street. The undisputed evidence discloses the fact that this was the only hole in the sidewalk between the two streets. Previous to the admission of this evidence, there was little or no controversy as to the location of the place of the accident. Upon this state of the case plaintiff's counsel introduced this evidence upon an undisputed fact, which, in its bearing on the case, might have been mischievous and harmful upon the minds of the jury, in suggesting to them the probability or possibility that the defendant, in making such repairs, deemed itself guilty of negligence in permitting the existence of this defect. The evidence that the defendant had subsequently repaired this defective hole would not be admissible under the rulings of this court in Morse v. Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358; Day v. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243.

The trial court did not in any manner, either by its rulings or instruction, attempt to remove from the minds of the jury this possible harmful impression which it might have created, nor restrict the evidence to its bearing upon the identification of the place where the injuries were received, although we do not wish to be understood as holding that, if he had done so, it would have cured the error of its admission. It was admitted, and permitted to stand without any explanation by the court as to the purpose for which it was admitted, except the bare statement of counsel that it was introduced only for the purpose of identification of the defective place. Thus, under the guise of proving an undisputed fact, the plaintiff

managed to get before the jury evidence of the city making repairs; and while it could not, under the decisions of this court, be construed as an admission of a previous neglect of duty, the matter was left in such a state that the jury might have so regarded it. The mere statement of counsel of the purpose for which he offered it might not have lessened its ultimate evil influence upon the minds of the jury, and the defendant was entitled to have it excluded from their consideration. Nor do we think the fact that the defendant subsequently permitted the plaintiff's witness to testify as to the time of fixing this hole or repairing this defective place constituted a waiver of its right to insist upon the erroneous ruling of the court in admitting this incompetent evidence.

Order reversed, and a new trial granted.

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ANDREW SAIKO v. ST. PAUL CITY RAILWAY COMPANY.[1]

December 24, 1896.

Nos. 10,231—(105).

Street Railroad—Accident to Passenger.

Evidence considered, and *held* insufficient to justify the verdict.

Appeal by defendant from an order of the district court for Ramsey county, Egan, J., denying a motion for judgment notwithstanding the verdict or for a new trial. Reversed.

Munn, Boyesen & Thygeson, for appellant.

J. J. McCafferty and *R. E. Noyes*, for respondent.

BUCK, J. Action to recover for personal injuries received while plaintiff was a passenger on the defendant's Interurban car. Defense, contributory negligence and release of damages.

The plaintiff entered the car at St. Anthony Park for the purpose of being conveyed to St. Paul, and in his complaint he alleges:

"That, as said car approached the city of St. Paul, and before said car had reached the intersection of University avenue and Mackubin street, plaintiff notified the conductor in charge of said car that he

[1] Reported in 69 N. W. 473.

desired to alight therefrom at Mackubin street; that, in accordance with the signal so given by the plaintiff, the conductor then and there in charge of said Interurban car signaled to the motoneer, and said car began to slacken its speed, and the plaintiff proceeded to the rear platform of said car for the purpose of alighting with all convenient speed; that plaintiff descended to the step of said car, intending to alight therefrom as soon as said car should come to a stop; that said car did not stop in compliance with this plaintiff's request, but, on the contrary, while plaintiff was standing on the step thereof, and before he had an opportunity to alight therefrom, the defendant carelessly and negligently started said car with a sudden jerk, whereby plaintiff was thrown violently to the ground, and in so doing he struck the ground on the right side of his head and right elbow, and was severely bruised and injured."

The plaintiff had a verdict for $100 damages, and the defendant moved for judgment in its favor notwithstanding the verdict, and for a new trial in the event that said motion be denied.

One of the errors assigned is that the verdict is not justified by the evidence. We do not think that any extended discussion of the evidence is necessary. The evidence conclusively shows that the plaintiff either stepped off from the car while it was in motion, and before it stopped, or else was on the first step from the platform, and in the act of getting off, when, as he testified, "the car was starting to stop," and he, either by a jerk of the car, or his stepping off while the car was in motion, fell, and was injured. The car had been running at its usual rate of speed (according to the evidence of some of the witnesses at least 7 to 12 miles an hour), and just commenced to slow up, when he stepped or fell off, and was injured. He intended to get off at Mackubin street, and before reaching there told the conductor where he wished to get off, and gave the signal that he wished to do so, and then went out on the platform, while the car was running fast, and at its usual rate of speed. The evidence is conflicting as to the exact place where the accident happened, he testifying that it happened on Mackubin street and other witnesses testifying that it happened half way between Kent and Mackubin streets. There were no witnesses sworn in behalf of plaintiff that corroborated his account of the accident. Two witnesses who saw the accident testified that plaintiff stepped off while the car was running at its usual speed, and other witnesses testified that it was running at its usual gait, and that they did not notice any jerk in the car.

Granting to the jury the usual right to pass upon the weight of evidence where it is conflicting, yet the plaintiff's own testimony shows that he was guilty of such contributory negligence as would bar his recovery. His attempting to get off from the moving car was the proximate cause of the injury. The case is widely different from one where the car has once stopped, and then suddenly jerks in starting, whereby a passenger is injured while getting off or on the car. Plaintiff should not have voluntarily placed himself in a position of danger before the car stopped, and while it was running at the rate established by the evidence. Nowhere does it appear that he made the slightest effort to steady or protect himself from any jerk or movement of the car by taking hold of the rails or any part of the car.

Not only is the weight of evidence so manifestly and palpably against the plaintiff, but his own contributory negligence is so self-evident, that we cannot do otherwise than remand the case to the court below, with instructions to order judgment in favor of the defendant and against the plaintiff notwithstanding the verdict.

So ordered.

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STATE OF MINNESOTA v. J. JARVIS and Another.[1]

December 24, 1896.

Nos. 10,260—(42).

Intoxicating Liquors—Violation of License.

G. S. 1894, § 2012, provides that all persons licensed to sell intoxicating liquors "are hereby required to close their places of business (hotels excepted) at eleven o'clock at night." J. and H. were indicted under this statute, charged with having unlawfully kept open after eleven o'clock at night their saloon, being a place wherein the sale of liquor was licensed; but the indictment contained no allegation that the place was not an hotel. *Held*, that the facts stated in the indictment did not constitute a public offense, inasmuch as it did not negative the exception.

Case certified from the district court for Polk county.

Defendants were indicted as stated in the opinion. They demurred to the indictment for the reasons (1) that it appeared from the

[1] Reported in 69 N. W. 474.

face thereof that the facts stated therein did not constitute a public offense; and (2) that it appeared from the face thereof that the facts stated therein did not constitute a public offense of which the district court had jurisdiction, and that the offense attempted to be set out was not indictable, but was exclusively within the jurisdiction of the municipal court of East Grand Forks. The demurrer was overruled. Reversed.

H. W. Childs and *Geo. B. Edgerton*, for the State.

H. Steenerson, for defendants.

BUCK, J. The defendants were indicted by the grand jury of the county of Polk at the general term of the district court held therein in the month of June, 1896, for the crime of keeping their saloon open after eleven o'clock at night, committed as follows:

"That said J. Jarvis and P. Holdahl, on the 24th day of March, 1896, at the city of East Grand Forks, in the county of Polk, and state of Minnesota, did willfully and wrongfully and unlawfully keep open after eleven o'clock at night on said day that certain place wherein the sale of intoxicating liquors was licensed, said place being then and there described as follows: Front room, lower floor, of that certain two-story frame building situated on lot fifteen, block nine, Eden Grove addition to the city of East Grand Forks, said place being then and there in charge and under control of said J. Jarvis and P. Holdahl."

Defendants demurred to this indictment on two grounds: First, that it did not state facts sufficient to constitute a public offense; second, that the offense attempted to be charged is not indictable, and that the court has no jurisdiction.

In support of the first ground of demurrer it is contended that the indictment should have negatived the exception contained in the enacting clause of the statute which defines the crime. G. S. 1894, § 2012, provides that all persons licensed to sell intoxicating liquors "are hereby required to close their places of business (hotels excepted) at eleven o'clock at night." It is contended that the indictment should have alleged that the place where these defendants were doing business was not an hotel. We think that the demurrer is well taken upon this point, and that the case is controlled by that of State v. McIntyre, 19 Minn. 65 (93), where it is said to be a familiar rule that:

"Where the enacting clause of a statute under which a criminal prosecution is brought describes the offense with certain exceptions in such clause expressed, it is necessary that an indictment should negative such exceptions."

The exception in the statute in this case is in the same clause that defines the crime, and the indictment should have negatived the exception. It is therefore unnecessary to discuss the second ground of demurrer. The court below overruled the demurrer, but, deeming the questions of law thereby raised to be so complex and doubtful as to require the decision of this court, certified the same hereto, with the consent of the defendants.

The order of the trial court is therefore reversed, and the case remanded to the court from whence it came, and such court directed to sustain by its order the demurrer to the indictment.

W. R. MURRAY v. ADA B. CHAMBERLAIN and Another.[1]

December 24, 1896.

Nos. 10,269—(174).

Foreclosure of Mortgage—Attorney's Fees.

Held, that there was no error in the trial court denying the defendants' application for a modification of the judgment in an action foreclosing a mortgage directing the payment of attorney's fees, upon the ground that the same was not authorized by the pleading or finding of the court.

Appeals by defendants from so much of a judgment of the district court for Ramsey county as adjudged due to plaintiff and provided for payment of an attorney's fee of $75, and also from an order, Otis, J., denying a motion to modify the judgment. Affirmed.

Chas. G. Laybourn, for appellants.

F. C. Stevens, for respondent.

BUCK, J. In the trial court the defendants moved to modify the judgment by striking out the provision directing payment of an at-

[1] Reported in 69 N. W. 474.

torney's fee, upon the ground that the same was not authorized by the pleadings or findings of the court. The judgment was entered in an action to foreclose a mortgage. The complaint alleged, the answer admitted, and the court found, that the mortgage foreclosed by this action contained a provision that in case of foreclosure the mortgagee might retain out of the moneys arising from sale, not only the principal and interest due on the note, with all costs and charges, but also the sum of $75, attorney's fees. This amount was authorized by law to be inserted in the mortgage by the sum of money therein secured to be paid, but in the complaint the value of the attorney's fees were not alleged, nor are they referred to in the findings of the court. Subsequently, upon plaintiff's motion, judgment was entered in accordance with the finding of the court, except that it adjudged due, among other things, "Attorney's fees provided in said mortgage, seventy-five dollars," and directed the sheriff, out of the proceeds of the sale, to pay the same to the plaintiff's attorney. Before entry of the judgment, the form and contents thereof were submitted to the attorney for the defendants, who, in his written answer to the letter of submission, stated as follows, "I don't see but what the proposed form of decree is all right," and did not therein make any objection or reference to the provision relating to attorney's fees. The form of the judgment was approved by the court in writing, before entry; and thereupon the mortgaged property was sold, pursuant to this judgment, and bid off by the plaintiff, for the full amount of the debt, including the sum of $75 attorney's fees; and these fees were accordingly paid to plaintiff's attorney by the sheriff, and his report of the sale was thereafter, on notice, duly confirmed, the defendants, however, objecting to such confirmation upon the ground that the payment of such attorney's fees was not authorized.

Upon these facts, the trial court denied the application for a modification of the judgment, and the grounds or reasons for so doing, which we approve, he stated as follows:

"Since the form of this judgment was submitted to the defendants' attorney before the entry containing this provision as to attorney's fees, and he consented to its entry,—for such must be the construction of his letter,—it was unnecessary to make any formal application to the court to fix the amount of these fees; and the judge was justified in fixing the amount of the fees at $75.00, as he did do by expressly

and in writing approving the form of the judgment as so submitted to defendants' attorney before it was entered by the clerk."

We deem a further discussion of the question unnecessary, and the judgment is affirmed.

STATE OF MINNESOTA v. CANNON RIVER MANUFACTURERS' ASSOCIATION.[1]

December 24, 1896.

Nos. 10,309—(45).

Corporation—Dissolution.

Held, that the order and judgment of the trial court were justified by the findings of fact.

Appeal by defendant from a judgment of the district court for Rice county, entered in pursuance of the findings and order of Buckham, J. Affirmed.

Geo. N. Baxter, for appellant.

H. W. Childs, Attorney General, and *Geo. B. Edgerton*, for respondent.

BUCK, J. This action was brought on behalf of the state of Minnesota, by its attorney general, for the purpose of having the defendant corporation restrained from exercising any of its corporate privileges, and to have it dissolved and its affairs wound up, and for the appointment of a receiver. The grounds for such relief are stated in the complaint. The court found that the allegations in the first 10 folios of the complaint were true. These allegations are as follows:

"(1) That the Cannon River Manufacturers' Association is a corporation duly organized and existing under and pursuant to the laws of said state. (2) That by an act of the legislature of the said state, entitled 'An act to aid the Cannon River Improvement Company in the construction of slackwater navigation on the Cannon river, from thence by way of Lake Elysian to the Minnesota river, at Mankato,' approved March 2, 1865, the said state granted unto the Cannon River Improvement Company, a corporation theretofore duly organized and existing under and pursuant to the laws of the said state, for the pur-

[1] Reported in 69 N. W. 621.

pose of aiding the said last-named company in the construction of slackwater navigation on the Cannon river in said state, and from thence by way of Lake Elysian, to the Minnesota river, near Mankato, all the swamp lands belonging to said state lying and being in the odd-numbered sections within the St. Peter land district, as the said district was then constituted, and not otherwise appropriated, to an amount not to exceed three hundred thousand (300,000) acres. That the said Cannon River Improvement Company was organized for the purpose of constructing canals, locks, dams, towpaths, and, generally, for the purpose of constructing slackwater navigation from the Mississippi river, via the Cannon river, to the lakes connected therewith, thence via Lake Elysian to the Minnesota river, near Mankato; but that, by an act of said legislature, entitled 'An act in relation to the Cannon River Improvement Company,' approved February 28, 1872, the said Cannon River Improvement Company was authorized and empowered to amend and alter its articles of incorporation, so as to make it a purpose and object of said corporation, in addition to the rights and purposes theretofore enjoyed, to construct and operate a railroad, under and pursuant to the General Laws of the said state, from the Mississippi river, via the valley of the Cannon river, along the route in said last-named act described, and granted and extended to the said Cannon River Improvement Company, for the purpose of constructing the said railroad, the right to have, use, and enjoy all and singular the moneys, capital stock, subscriptions, property, and rights of every nature and kind, acquired or pledged for the purpose of the construction of the said canal and slackwater navigation and works connected therewith, and upon substantially the same conditions, so far as the same could be made conformable to the change of public improvement contemplated by the said last-named act. That, in pursuance of the said last-named act, the said Cannon River Improvement Company did thereafter amend and alter its said articles of incorporation, so as to make it a purpose and object of said corporation, in addition to the rights and purposes theretofore enjoyed by it, to construct and operate a railroad, under title 1 of chapter 34 of the General Statutes of said state, from the Mississippi river, via the valley of the Cannon river, along the route aforesaid; and that the amendments and alterations of the said articles were duly filed and recorded in the office of the secretary of state of said state. (3) That, pursuant to an act of the legislature of the said state entitled 'An act to amend section 2 of chapter 67 of the Special Laws of 1865, as amended by chapter 118 of the Special Laws of 1870, relating to the Cannon River Improvement Company,' approved February 27, 1875, it was provided, among other things, that in case the said Cannon River Improvement Company should elect to apply the grant made in the act first hereinbefore named to the building of a railroad as authorized by chapter 111 of the Special Laws of 1872, at least one-twelfth of said grant should be selected pro rata, and set apart for the purpose of developing and improving the water powers and manufacturing resources of the Cannon river, which said lands so selected and

set apart should never be diverted from the said last-named object, and that whenever a corporation of the proprietors of the mills of said Cannon river should be formed for that purpose the lands thus selected and set apart should be transferred by the said Cannon River Improvement Company to the corporation composed of the said proprietors, to be used and applied under its direction as in said last-named act provided."

The court further found: That, pursuant to the terms of the various acts under which the defendant became entitled to its land grant, it has selected, and the governor of the state has conveyed to it, in the aggregate, 24,181.45 acres; and that said corporation has disposed of the same, and received therefor the sum of $41,723; and that it is entitled to receive, under the terms of its said grant, an additional amount of 818.55 acres.

"That the defendant corporation was originally composed of proprietors of various mills, located on Cannon river, who were largely interested in the development of its water powers, and had a direct pecuniary interest in the judicious expenditure of the proceeds of said grant for such purpose; and that during the earlier years of the existence of such corporation, and while such interest continued, its members expended the moneys that came into their hands according to their best judgment in carrying out the purposes designed in the grant; and that such expenditures, where actually put into such improvements, were made judiciously, and in such a manner as to produce good results, and according to the true intent of the grant. That the defendant has become entangled in much and expensive litigation, involving the expenditure of over six thousand dollars of its funds in this direction; but I find that such litigation was more the misfortune of the defendant than the fault of its management, and that the same has been to a large extent incurred in defending and enforcing its legal rights. That the defendant, though receiving and disbursing large sums of money, has never kept books of account, and has none but very crude records of such receipts and disbursements; and that the management of its affairs has been largely in the hands and under the control of one or two of its members. That during the latter years of the existence of the defendant corporation most of its members had ceased to own any mill property on said Cannon river, or to have any pecuniary interest in the development of its water powers; and that, previous to the commencement of this action, all such members had sold and conveyed away all their interest in the mills on said river in which they were formerly interested; and that no one of them is now the owner of, or in any manner interested in, any mill power on said stream. That all the members of defendant corporation have ceased to have any interest in the management of its affairs, or any concern for the best use of its remaining funds to complete the improvements for which they were granted, or in any further improvement of the wa-

ter powers of Cannon river; and that the moneys due such corporation, and the proceeds of a judicious sale of its remaining lands, would, if wisely expended, largely supplement the work already done, and greatly improve such water powers, and benefit the present owners, who have succeeded to the rights therein of the original proprietors, the members of the defendant corporation. That the amount of funds which the defendant is likely to receive, applicable to the purposes of its trust, and exclusive of the additional land to which it is entitled, will depend very much on the outcome of the litigation in which it is engaged; but that the same will probably amount to several thousand dollars."

Upon the facts, the court found, as a conclusion of law, that the plaintiff is entitled to have the defendant corporation dissolved, and its affairs wound up, and a receiver appointed to take charge of its property and effects and apply the same to the purpose for which such corporation was organized.

Only errors of law are assigned, viz. that the decision and judgment entered therein are contrary to law. The application is one for the appointment of a receiver, and not a case where the merits of the controversy have been determined, and a final trial had, and therefore we have set forth the facts found by the trial court quite fully, to show the grounds upon which the order was made appointing a receiver. We are of the opinion that the undisputed facts bring the case within that of State v. Park & Nelson Lumber Co., 58 Minn. 330, 59 N. W. 1048, and that the action is authorized by G. S. 1894, § 359, which in part reads as follows, in reference to the duties of the attorney general, viz.:

"If it comes to his knowledge that any incorporated company has offended against the laws of the state, misused, surrendered, abandoned or forfeited its corporate authority or any of its franchises or privileges, he shall cause proceedings to be instituted against it."

Upon the case as presented, an extended discussion of the facts and law applicable thereto is not necessary. Judgment affirmed.

CANTY, J. I concur, on the ground that the defendant has failed for so long a time to complete the work for which it was created that the state is, through its attorney general, justified in winding defendant up.

MICHAEL T. STARR v. GREAT NORTHERN RAILWAY COMPANY and Others.[1]

December 24, 1896.

Nos. 10,315—(87).

Carrier—Injury to Person on Train—Violation of G. S. 1894, § 2706—Limiting Liability.

The plaintiff, while engaged in the business of news agent on defendant's train, was injured by a collision caused by the negligence of defendant in not stopping its train before arriving at a railroad crossing, as required by G. S. 1894, § 2706. The statute referred to requires railroad companies to cause all their trains to entirely stop not more than 60 rods and not less than 10 rods before each arrival at the crossing of any other railroad, and provides that every corporation that violates the provisions of the statute is liable to a forfeiture of not more than $100 nor less than $20, to be recovered in a civil action, and is further liable in the full amount of damages done to person or property in consequence of any neglect to comply with the requirements of the statute. *Held*, in view of the provisions and manifest object of this statute, that a contract between the defendant and plaintiff, exempting the former from liability for injuries caused by its negligence, is void, as against public policy, as respects negligence consisting of a violation of the statute; and this, too, although the defendant may not have borne to the plaintiff the relation of common carrier.

Appeal by defendants Great Northern Railway Company and Thomas F. Oakes and others, as receivers of the Northern Pacific Railroad Company, from a judgment of the district court for Ramsey county, in favor of plaintiff, after a trial before Charles D. Kerr, J., and a jury. The case against the Great Northern Company was dismissed. Affirmed.

C. W. Bunn and *L. T. Chamberlain*, for appellants Oakes and others.

Stevens, O'Brien, Cole & Albrecht, for plaintiff respondent.

Flandrau, Squires & Cutcheon, for intervenor Riley.

BUCK, J. On November 24, 1894, the plaintiff was acting as news agent, selling papers, periodicals, and fruit, on the railroad trains

[1] Reported in 69 N. W. 632.

operated by the receivers of the Northern Pacific Railroad Company, named, among others, as defendants herein. At the city of St. Cloud, in this state, the Northern Pacific Railroad crosses the Great Northern Railway, owned by one of the defendants herein. About 4 o'clock a. m., before daylight, on the day above named, the operatives of a freight train on the Great Northern Railway and a passenger train on the Northern Pacific Railroad on which plaintiff was riding, by their gross negligence, caused a collision at such crossing, whereby this plaintiff was injured.

Plaintiff sued all of the defendants for injuries sustained by him. The intervenor was brought into the case, upon notice by the receivers, to defend the action by reason of certain contracts with the plaintiff and with the Northern Pacific Railroad Company which will be referred to hereinafter. At the trial of the cause a verdict was ordered in favor of the Northern Pacific Railroad Company, it being, at the time of the collision, in the hands of the defendant receivers. The question of the negligence of the Great Northern Railway Company was submitted to the jury, and at the same time the court instructed it that the evidence showed conclusively that the receivers were guilty of negligence. The jury returned a verdict in favor of the plaintiff, and against the Great Northern Railway Company and the defendants Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and their successors in office as such receivers, for the sum of $1,000. The defendants appealed from the judgment entered upon the verdict.

No question is seriously raised as to the negligence of both the Great Northern Railway Company and the receivers in operating their roads at the time of the collision resulting in the injury to the plaintiff. The receivers seek to escape liability upon the ground that the plaintiff, who was a news agent of his employer, the intervenor, Riley, upon the Northern Pacific train, had, by virtue of a contract between himself and Riley, released the railroad company and the receivers from the consequences of their actions, and also upon the further ground that they had a contract with Riley by which he insured them against the result of their actions, and therefore they are entitled to a judgment against him in case of plaintiff's recover-

ing a judgment against them. The contract between Riley and the Northern Pacific Railroad Company is dated January 1, 1890, before the appointment of the defendant receivers, and was by its terms to remain in force for the period of five years from its date, subject to be terminated on 30 days' notice, and in part contained the following provisions:

"During the period while this contract shall remain in force, the party of the second part shall have and enjoy the sole and exclusive right and privilege of selling and offering for sale, by himself or by his agents, upon all passenger trains of the party of the first part, on the several lines of railroad operated by it west of St. Paul or Ashland, such newspapers, printed books, periodicals, and other articles commonly sold by train news agents as the party of the second part may choose to sell, which shall not be of a character objectionable to the party of the first part. * * * The party of the second part shall be entitled to free passage over the lines of railroad aforesaid, upon the trains aforesaid, for himself and his agents, engaged in carrying on the business contemplated by this contract: provided, however, that not more than one agent shall be entitled to a free passage upon any one train. * * * The party of the second part hereby releases and discharges the party of the first part from all liability for damages received by any property of the party of the second part while upon the trains of the party of the first part, and from all liability from injuries suffered by any agent or employé of the party of the second part while on any train or upon any premises of the party of the first part, whether such damage or injury shall be caused by the negligence or misconduct of the agents or employés of the party of the first part or otherwise; it being intended that the party of the second part shall, and does hereby, assume all risk of damage to his property or injury to any of his agents or employés while upon the trains or premises of the party of the first part."

The consideration which Riley agreed to pay the railroad company for this privilege from January 1, 1893, to January 1, 1895, was $1,000 per month, and forfeitable, at the option of the railroad company, upon nonpayment. The contract between plaintiff and Riley was dated April 19, 1894, and provided that plaintiff should act as news agent for Riley, and sell his goods, wares, and merchandise on the passenger trains, and in consideration thereof Riley agreed to pay him a commision of 15 per cent. on the amount which he sold. This contract also recited, in substance, the provisions of the contract between Riley and the railroad company in regard to a release of all liability for injuries by any agent or employé of Riley while on

any train upon the premises of said company, and contained, also, this further provision:

"The said party of the second part doth further agree with the said party of the first part hereto that the said party of the second part will release and discharge, and doth hereby release and discharge, the said party of the first part from all liability to the said party of the second part under said agreement with said company, and the said company from all liability for injuries suffered by the party of the second part while on any train or upon the premises of said company, whether such damage or injury shall be caused by the negligence or misconduct of the agents or employés of said company or otherwise; it being intended that the party of the second part shall, and doth hereby, assume all risks of injury to himself while upon the trains and premises of said company. W. C. Riley. M. T. Starr, per D. H. McGuire."

We do not deem it necessary to discuss or determine several of the questions raised and argued by counsel, because, in our opinion, the case can be properly and legally disposed of under the provisions of G. S. 1894, § 2706, which in part reads as follows:

"Every railroad corporation organized under this title shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such corporation as a station for receiving passengers upon such trains, at least one minute: provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety; and also cause all its trains of cars to entirely stop not more than sixty rods, and not less than ten rods, before each arrival at the crossing of any other railroad; and every corporation, and every person in the employment of such corporation, that violates, or causes or permits to be violated, the provisions of this section, is liable to a forfeiture of not more than one hundred dollars, nor less than twenty dollars, to be recovered in a civil action before any justice of the peace of the county in which such violation occurs, upon the complaint of any person, one-half to go to the complainant, and the remainder to the use of common schools in the county; and such company is further liable in the full amount of damages done to property or person in consequence of any neglect on the part of its agents or employés to comply with the requirements of this section."

In view of this provision of the statute, we think that it is quite immaterial whether the plaintiff was or was not, technically, a passenger upon the train, or whether the railroad company occupied the relation of common carrier as to him. The plaintiff was on the train with the consent of the railroad company, with the privilege

of selling certain commodities thereon, and for which privilege the company had been paid a full consideration. In the case of Jacobus v. St. Paul & C. R. Co., 20 Minn. 110 (125), this court held that:

"There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state."

This provision of the statute goes much further than the rule there laid down, in this: that a railroad company guilty of negligence in the respects therein mentioned is liable to the full amount for damage done to property or person. It is quite immaterial, therefore, in what capacity the person injured may be upon the train. If not himself guilty of contributory negligence, and he is rightfully there, he can maintain an action for injury done him by such negligence of the railroad company.

The rule seems to be a stringent one, but the interest of the state in the life and welfare of the citizen is paramount, and not affected by the mere consideration of his not being a passenger on the railroad train. Where human life may thus be endangered or destroyed, the state may pass laws of a prohibitory character, and make the party violating them liable in damages to the party thereby injured. And when, by express prohibitory enactments, the state has thus declared its public policy, and provided a remedy for enforcing it, we do not think that it is competent for a railroad company to stipulate against this statutory liability. If it were otherwise, the state might, in its attempt to enforce a wise public policy, be completely thwarted, and the law thus nullified. This right of the state to interfere in behalf of the welfare of its citizens is an important one, and ought not to be bartered away by the contract of parties, and especially by railroad companies, who derive their rights to operate their roads from the sovereign power. Liability upon the part of the railroad company in this respect will bring about a corresponding vigilance, and thus the safety of the citizen and protection of property be secured. We are therefore of the opinion that the contracts entered into, releasing the company from any liability for negligence upon its part in operating its road, were in conflict with the public policy enunciated by the statutory provisions referred to, and are void.

There is no merit in the contention of the receivers that they are not liable, as they were operating the Northern Pacific Railroad at the time of the injury. See 20 Am. & Eng. Enc. Law, tit. "Receivers (Railroads)," pp. 378, 379, and cases cited in notes.

Judgment affirmed.

On Application for Reargument.

(January 11, 1897.)

PER CURIAM. One of the grounds of the application for reargument is that the court has not passed upon the question whether the intervenor, Riley, is liable upon his contract to indemnify the receivers. Riley intervened on his own motion, asking: (1) That the action be dismissed as to the receivers; (2) that any damages sustained by the plaintiff may be recovered of the Great Northern Railway Company; (3) that, if plaintiff should recover against the receivers, then that the intervenor may have judgment against him upon his bond of indemnity, and that such judgment may be set off against plaintiff's judgment against the receivers.

The answer of the receivers is wholly responsive to the complaint of the plaintiff, and in their pleadings they nowhere ask for any relief against the intervenor. After verdict, the receivers moved for a new trial, and, in case that was denied, for judgment against the intervenor. These motions having been denied, judgment was entered on the verdict against the receivers and the Great Northern Railway Company. The appeal of the receivers was only from this judgment. On this state of facts, the liability of the intervenor to the receivers is not involved in this appeal.

Motion denied.

AADNE C. TVEDT v. ALEX MACKEL and Others.[1]

December 24, 1896.

Nos. 10,329—(156).

Action by Receiver—Pleading.

Although the general allegations in the complaint state that an order in supplementary proceedings was duly issued by the court herein, thereafter a hearing was had in supplementary proceedings, and disclosure and report of the referee made, and that the plaintiff herein was on motion appointed receiver, it does not appear that such supplemental proceedings were founded upon the judgment defendants' creditor held. *Held*, that the complaint is not sufficient, to show that plaintiff occupies a status, either as creditor or as the representative of creditors, which entitled him to assail conveyances as fraudulent. Sawyer v. Harrison, 43 Minn. 297, followed.

Appeal by defendants from an order of the district court for Norman county, Ives, J., overruling demurrers to the complaint. Reversed.

Lee Combs and *Alex Mackel*, for appellants.

Michael A. Brattland and *Ole J. Vaule*, for respondent.

BUCK, J. This action is one to set aside conveyances alleged to have been executed in fraud of creditors. It is claimed by the plaintiff that he sues in the capacity of receiver of one of the defendants, and that he was appointed, by order of the court, such receiver in proceedings supplementary to execution, and that it is so alleged in the complaint. There are several defendants, one of whom demurred to the complaint separately, and the several other defendants joined in the other demurrer. Each demurrer was interposed upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The only allegation in the complaint tending to show the status which the plaintiff occupies, relative to the parties to the action, is as follows:

"That on the 14th day of November, 1895, an order in supplementary proceedings was duly issued by the court herein, and that on the 20th day of November, 1895, and on subsequently adjourned days, a hearing in supplementary proceedings was had, and that, upon such dis-

[1] Reported in 69 N. W. 475.

closure and report of the referee appointed in such proceedings, the plaintiff herein was, on motion, appointed receiver on the 25th day of January, 1896, and has duly qualified as such receiver."

Of whose estate the plaintiff was appointed receiver cannot be ascertained from these allegations, and it would be a useless effort to try to do so. The plaintiff, therefore, is not entitled to assail the conveyances between the defendants on the ground of fraud. This was so held in the case of Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434.

Order reversed.

THEODORE KIMM v. PATRICK GRIFFIN.[1]

December 24, 1896.

Nos. 10,351—(238).

67 25
75 161
67 25
78 227

Deed—Covenants Running with the Land—Party-Wall Agreement.

A party-wall agreement, under seal, between S. and K., adjoining lot owners, which was duly acknowledged and recorded, provided that whereas K. was about to erect a two-story brick building on his lot adjoining that of S., in consideration that K. erect a good and substantial 12-inch wall, 80 feet long north and south, extending 6 inches on the adjoining lot of S., then said S. promised and agreed that whenever he should erect a building on his lot, and use that portion of said party wall built thereon, he would pay K. one-half the cost of said party wall, to the extent of his use of the same; and for their mutual benefit it was agreed that in all deeds and transfers, of whatever nature, said wall should be reserved as a partition wall, and that the same should be kept in good condition and repair at the expense of both parties, they dividing and paying the expense thereof equally between them, and that such stipulations should apply to and bind the heirs and assigns, executors and administrators, of the respective parties. K. erected the party wall, one-half upon his lot, and one-half upon the adjoining lot of S. Subsequently K. conveyed by warranty deed to M., and thereafter M. conveyed by warranty deed to G., who also purchased by deed of warranty the lot of S., and thereafter erected a two-story building on said lot, using said party wall the whole length for such purpose, and occupied the same. *Held*, that the covenants in the agreement ran with the land, and that a personal action by K. against G. was not enforceable.

[1] Reported in 69 N. W. 684.

Appeal by plaintiff from a judgment of the district court for Dakota county, in favor of defendant, entered in pursuance of the order of Crosby, J. Affirmed.

Ernest Otte, for appellant.

W. H. DeKay, for respondent.

BUCK, J. Action to recover one-half of the cost of a party wall erected under a sealed agreement. The stipulated facts are as follows:

"First. That on the 17th day of November, 1869, the plaintiff was the owner in fee of the middle one-third of lot one (1), block thirteen (13), in the city of Hastings, and described in the complaint in this action, and that one Peter Smith was the owner in fee of the west one-third of said lot one (1), block thirteen (13), which adjoins said middle one-third of said lot one on the west. Second. That on said 17th day of November, 1869, said Theodore Kimm and said Peter Smith, their wives joining, executed the party-wall agreement referred to in said complaint, a copy of which is attached thereto and made a part hereof. Third. That subsequent to the execution of said party-wall agreement, and in or about the spring of 1870, said Theodore Kimm erected a two-story brick building, eighty feet in length, the west wall of which was twelve inches in thickness; one-half thereof, or six inches, resting on the west one-third of said lot one (1), and the other half, or six inches thereof, resting upon the middle third of said lot one. Fourth. That said Theodore Kimm and wife, on the 27th day of January, 1876, conveyed by warranty deed the said middle one-third of said lot one (1), to one Marcus Marx, a copy of which is hereby attached, referred to, and made a part hereof, marked 'Exhibit B.' Fifth. That on the 15th day of July, 1895, said Marcus Marx conveyed by warranty deed to defendant herein, Patrick Griffin, the said middle one-third of said lot one (1), a copy of which is hereby attached, marked 'Exhibit C,' and made a part hereof. Sixth. That on the 12th day of June, 1895, said Peter Smith and wife, Barbara, conveyed by warranty deed to the defendant herein the west one-third of said lot one (1), a copy of which is hereby referred to, marked 'Exhibit D,' and made a part hereof. Seventh. That before the commencement of this action the defendant erected a two-story brick building on said west one-third of said lot one (1), extending the entire length of the west wall, or 'party wall,' above mentioned, joining the same to the building heretofore mentioned, and built on said middle one-third of said lot one (1), and occupied the same, and in doing so used said party wall as the east wall thereof. Dated at Hastings, Minn., Apr. 29th, 1896."

Upon these facts the trial court ordered that judgment be entered in favor of the defendant.

Griffin, the defendant, at the time of the commencement of this action, owned the entire property, having purchased the title to the middle one-third of lot 1 from the Marcus Marx to whom Kimm had conveyed it, and the west one-third of lot 1 defendant had purchased from Peter Smith. All the conveyances were by warranty deeds. On the 17th day of November, 1869, Kimm and wife entered into an agreement with Smith and wife, stating therein that Kimm was about to erect a two-story building upon his lot adjoining Smith's, and that if he (Kimm) should erect a good and substantial 12-inch wall, 80 feet long north and south, extending 6 inches on the east side of Smith's lot, then Smith would, for so much of said party wall as he might use, pay Kimm one-half the cost thereof as soon as the building should be completed and occupied by said Smith. Griffin's acts in the premises are stated in the seventh subdivision of the facts stipulated. By the terms of the agreement the party wall was to be kept in good condition and repair by each party paying share and share alike. All of the stipulations were to apply to and bind the heirs, assigns, executors, and administrators of the respective parties. It was also stipulated that in all deeds and transfers said party wall should be reserved as such for the mutual benefit of the parties.

The evident meaning of these stipulations is that the building of the party wall should not be limited to the parties making them, or during their ownership of their respective premises, but that whoever should succeed to the estates, either their heirs or assigns, should have the same rights and liabilities under the agreement as their predecessors had or might have. If Kimm did not build the wall, and should convey his premises, and his grantee or any subsequent grantee built the wall, then he would have the right to recover the expense thereof from Smith if he still owned the premises and built and occupied the party wall, and, if not, then from his grantees or subsequent grantees of the premises who built and used the wall under the agreement. Each adjoining owner would have an easement in that portion of the party wall owned by the other, and the agreement creates mutual covenants running with each lot. It is under seal, duly acknowledged and recorded. That it does not, in express terms, contain covenants running with the land, is not material. It does create an easement in favor of each respective lot

owner and his successors in interest in the one-half of the wall which stands on the other lot. Benefits and burdens therefore arise from the covenants contained in the agreement, and are inseparably connected therewith. There was a joint easement in the wall the moment it was built, and Smith's liability to the extent of one-half the cost arose as soon as it was completed, if he still owned the premises, and erected a dwelling and occupied half of the wall.

But to whom was he liable? Not to Kimm, as he had, at the time this action was brought, parted with his title, and no longer had any interest in the lot or party wall, and his conveyance contained no reservation of right to recover half the expense of building the wall. When he conveyed his title he was no longer under any legal obligation to keep the wall in repair jointly with the other owner if he should build and occupy the wall according to the agreement. This right of either party to enforce this stipulation as to keeping the wall in good condition and repair, and thus rendering either party liable to perform it, must necessarily pass to the assignee of the lot. The agreement has direct reference to the lots, and is beneficial to the respective owners as owners, and not to third persons. The purchaser bought with the presumption, if not absolute assurance, that in making the purchase he was to enjoy all the benefits received, and be liable for all the obligations incurred.

Such must have been the intention of the parties, for by the very terms of the stipulations the party wall and conditions imposed were to be permanent. The right was not exercised until more than 25 years after the date of the agreement, and the erection of the building by Kimm, nor until both of the original parties to the agreement had conveyed their respective lots; and each lot so conveyed was subject, under the agreement, to a burden for the benefit of the adjoining premises. The obligations of the parties under the stipulation were not to cease with the mere erection of the building and occupation of the party wall, but such burden was to be continuous, so long, at least, as the building endured, and the wall was occupied by the parties or their successors.

If Kimm had not erected the building and occupied the party wall, Marx, as his grantee, or Griffin, as the grantee of Marx, would have had the right to do so under the stipulation which provides that it shall apply to Kimm's assigns. Griffin, the defendant, was the last

grantee holding under the mesne conveyances, and with this right was the corresponding obligation to repair the party wall and keep it in good condition. He was also the grantee of Smith. But as he had the title to both lots, the burdens and benefits merged in him, and therefore he had no cause of action against any one, and was liable to no one else, because, from the language, and intent to be gathered from the original agreement, we think that the covenant ran with the land, and that Kimm and Smith did not intend a merely personal contract between themselves. Certainly, contracts with reference to party walls should be construed with a view to carry out the purpose and intent of the parties. A party wall is for the common benefit of both tenements which it supports, and either owner can use it for the purpose contemplated by the agreement for its erection and subsequent use.

This view of the case leads to the conclusion that Kimm has no cause of action against Griffin upon the agreement. It was not merely a personal contract between him and Smith. Having parted with all his interest and title in the lot owned by him at the time of the agreement, he was no longer liable under the stipulations to make repairs on the party wall, nor keep it in good condition, nor entitled to any subsequent benefits from the erection and use of the wall by his or Smith's successors. In some jurisdictions it is ruled differently, while in others the rule is that the covenants run with the land. Of the latter class of cases are the following: King v. Wight, 155 Mass. 444, 29 N. E. 644; Richardson v. Tobey, 121 Mass. 457; Platt v. Eggleston, 20 Ohio St. 414.

"A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land to which the covenant is attached." Savage v. Mason, 3 Cush. 500.

Construing the agreement and the warranty deeds together, it seems to us clear that the covenant in regard to the party wall must be deemed to run with the land, and that a personal action by K. against G. is not enforceable.

Judgment affirmed.

MITCHELL, J. I concur. Without going into any general discussion of the very abstruse and technical learning of the books as

to what covenants do and what do not run with the land it is sufficient to say that it is settled by the great weight of authority that the covenants of party-wall contracts, like the one under consideration, do run with the land and that all their benefits and burdens—the liability to perform and the right to take advantage of them—both pass to the heir or assignee of the land to which the covenant is attached. This doctrine is really of equitable origin and proceeds upon the theory that such covenants are not to be considered as merely personal or collateral and detached from the land; that they have direct and immediate reference to the mode of occupying and enjoying the land and are intended to be beneficial to the owner as owner and to no other person; that they in effect create a mutual easement in each tract for the benefit of the other. The cases bearing on this subject are largely cited and discussed in the American notes to Dumpor's and Spencer's Cases in 1 Smith, Lead. Cas. 93, 137.

On Application for Reargument.

(January 11, 1897.)

PER CURIAM. Appellant asks a reargument on the ground that the decision herein overrules Pillsbury v. Morris, 54 Minn. 492, 56 N. W. 170, which has, it is claimed, become a rule of property. Notwithstanding what was said in the opinion, the Pillsbury case was correctly decided upon its special facts, which were that the person erecting the party wall expressly reserved his right to enforce payment for one-half of the cost of the wall, when he assigned his lease of the land on which one-half the wall stood. In this respect the case is distinguishable from the one at bar.

ALMERIC H. PAGET v. ELECTRICAL ENGINEERING & SUPPLY COMPANY.[1]

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s82 245

67 31
s85 311

December 24, 1896.

Nos. 10,386—(126).

Hearsay Evidence.

In an action where the controversy related to the execution and acceptance of a written lease, a witness was permitted to testify, against objection, as to the declarations of a third person tending to establish the time of execution and acceptance of such lease, which declarations were not a part of the res gestæ. *Held*, that the admission of such declarations as testimony was error.

Appeal by defendant from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Reversed.

Walter C. Tiffany and *Edward C. Gale*, for appellant.

How & Butler, for respondent.

BUCK, J. The defendant corporation occupied a part of a certain building in the city of St. Paul from October 1, 1891, to October 1, 1892, under a written lease for that year from Mrs. Ella B. Lawton, the owner of the whole building, at a rental of $100 per month. After the expiration of this lease, defendant remained in the possession of the premises until May 1, 1893, when it occupied an additional space or room at an increased rental of $195 per month for the whole premises, rented and occupied them until about July 15, 1893, when it removed to the city of Minneapolis, and wholly abandoned the premises in question. In the meantime, and on December 31, 1892, the plaintiff herein was appointed by the district court of Ramsey county, in an action brought to foreclose a certain mortgage upon the premises, the receiver thereof, and of all the interests of Mrs. Lawton therein. After such appointment, the rental was paid to the receiver, except the amount claimed to be due for the months of August, September, October, and November.

This action is brought to recover the rental due for such four months, and accrued interest, upon a lease which he alleges to have been made by the defendants and Mrs. Lawton some time between

[1] Reported in 69 N. W. 475.

the termination of the first lease, in October, 1892, and prior to December 31, 1892, the day of his appointment as receiver. Upon the trial it was admitted that the five-years lease was only signed by Mrs. Lawton. The defense was: First, that the written lease was executed, if at all, at some time in the month of March or April, 1893, subsequent to the appointment of the receiver, and, not being signed or executed by defendant, was void under the statute of frauds; second, that no such lease was ever accepted or acted upon, and never took effect; and, third, a subsequent surrender of the lease, and its acceptance by plaintiff, through Dr. Lawton, the husband of the former owner, acting as the plaintiff's agent. The cause was tried by a jury, and it rendered a verdict in favor of the plaintiff for $1,020.79.

The plaintiff, upon the trial, sought to show that the so-called "five-years lease" was executed by Mrs. Lawton prior to the time of the appointment of the receiver. This, of course, was necessary, because her right to do so terminated with the appointment of the receiver, December 31, 1892. The most material testimony given upon the trial in behalf of the plaintiff was that of Dr. Lawton, the husband of the owner of the property. This testimony related to the execution and acceptance of the lease, the amount of rental, and its time of payment, and extent of the premises rented and occupied, and the amount of rent to be paid, and also to his management of the building of which defendant occupied a part. In some respects his testimony was not very satisfactory, and plaintiff sought to strengthen it by introducing in evidence declarations or admissions made by him to another person subsequent to the appointment of the receiver. After the defense had rested, the plaintiff's attorney recalled the witness Stillwell, and the following proceedings took place:

"Mr. How. You have testified that when Mr. Paget was appointed receiver you took charge of the property for him. Now, state, if you please, what was your first step with regard to taking care of the property, with regard to investigating the tenants, etc. A. My first step was to get authority to collect the rents, and to notify the tenants. I served notice on them all to pay the rent to A. H. Paget, receiver. Then I went to Dr. Lawton, and got my information from him as to what all the tenants were paying. That must have been very soon after the first of the year. I don't think I went right at it the first day, but it was soon after. Q. What, if anything, did Dr. Lawton say

to you about the lease of this defendant? (Objected to by defendant as incompetent, irrelevant, immaterial, and hearsay.) Mr. How: I desire to show by this witness that at the time when he went to get this information from Dr. Lawton, who had theretofore had the building in charge—I desire to show that his information was at that time, from Dr. Lawton, among other matters, that this company would have a new lease from the 1st of May at a larger rental (one hundred and ninety-five dollars per month); that they were at that time paying one hundred and fifty dollars,—all this as bearing upon the question of the agreement for one hundred and ninety-five dollars having been made prior to the 31st day of December. The Court: Without going into the details of that conversation, he can state the details in regard to the lease at that time. I don't want his conversation, but his information on taking charge of the building as to the condition of that lease. Mr. Gale: From Dr. Lawton? The Court: Yes, sir. Mr. Gale: We shall object to that equally strenuously. It seems to me clearly hearsay. Dr. Lawton has already testified as to what he has said, and we have not attempted to impeach his testimony. We think that this testimony would be admissible for them only to brace up the doctor's testimony after impeachment. The Court: Well, Dr. Lawton was at that time the agent of the assignor for whom this receiver was appointed. (Objection overruled. Defendant excepts.) A. I was told that the original lease had expired on the 1st of October previous, and at that time they were paying one hundred and fifty dollars a month for the store and I think one room upstairs; but that they were to have the whole of one side of the second floor from the first of May. And that their lease was to be one hundred and ninety-five dollars per month. (This witness was not cross-examined. Testimony closed.)"

This evidence was offered and received for the purpose of its bearing upon the question of the five-years lease, and the time of its making and acceptance. The exact date to which this conversation relates does not appear, but it does appear that it was subsequent to the appointment of the receiver, and that it was also subsequent to the time when Stillwell had served notice on the defendants to pay rent to Paget, the receiver. According to Dr. Lawton's own testimony, it was not made at or near the time when he made the lease with, and left it with, the defendant. In no aspect of the case can it be said that it was made at or near the time when this conversation between Dr. Lawton and defendant took place, but long subsequent to the time of the appointment of the receiver, and when Dr. Lawton neither had possession in fact nor in law of the premises in controversy, nor any right to such possession. It therefore could not be said that it formed any part of the res gestæ, nor as the dec-

laration or admission of a party in possession of the property against his own interest or otherwise. Dr. Lawton disclaimed being an agent in any manner or representing Paget as receiver.

The admission, therefore, of this testimony might have had a very mischievous and injurious effect upon the minds of the jury, and have been seriously prejudicial to the rights of the defendant. It cannot, by any means, be said that the fact of the acceptance of the lease and its terms had been in fact already established by the weight of evidence. It was for the very purpose of establishing this fact of the acceptance of the lease that it was offered in evidence by the plaintiff. Dr. Lawton was an interested witness, and there was but little testimony given to corroborate his own, and we cannot but regard the admission of such evidence as hearsay, and clearly erroneous. We cannot, in any view of the law, regard the admission of this testimony as harmless. If the plaintiff could bolster up his case by the narrative of one person, which at that time was no part of the transaction itself, he could introduce innumerable witnesses to testify to the same declarations, and its entire probative force would ultimately rest upon the unsworn statement of one person. It is quite impossible for this court to say just how much influence such testimony had upon the minds of the jury, but the fact remains that it might have influenced them to a preponderating extent, and have been injurious to the rights of the defendant.

Plaintiff's counsel seems to assume that the only issue in the case was whether Mrs. Lawton signed the five-years lease before or after December 31, 1892. We do not understand the case in that way. The lease must have been accepted by the defendants in order to become operative and binding. Whether the evidence justified the jury in finding that defendants had accepted the lease, it is not necessary for us to decide. But, to avoid misapprehension on another trial, we suggest that, conceding that Mrs. Lawton signed this lease in duplicate, and that Lawton, her agent, handed them to defendants before December 31, 1892, the fact that defendants received the papers, and retained them in their possession without signing them, would not necessarily amount to an acceptance.

Order reversed, and new trial granted.

WILLIAM W. BILLSON v. WILLIAM P. LARDNER and Others.[1]

December 24, 1896.

Nos. 10,388—(107).

Wolf v. McKinley, 65 Minn. 156, followed.

The case of Wolf v. McKinley, 65 Minn. 156, followed.

Lien—Dissolution by Assignment—Appeal.

The trial court made findings of fact and an order thereon, and subsequently, by agreement of the respective parties, it made additional findings and an order thereon, and filed the same. *Held*, that the last order must be deemed the final one in force, and that an appeal might be taken therefrom within 30 days after written notice of the same.

Appeal by plaintiff and by defendant William P. Lardner, assignee, from an order of the district court for St. Louis county, Morris, J., made February 21, and filed February 26, 1896, ordering plaintiff to pay to defendants Joseph Wolf and others, copartners as Wolf Brothers' Bank, the sum of $3,546.61. Reversed.

Billson, Congdon & Dickinson, for appellants.

Wilson & Wray and *J. L. Washburn*, for respondents.

BUCK, J. Upon the merits this case is controlled by that of Wolf v. McKinley, 65 Minn. 156, 68 N. W. 3.

Upon the question of practice it appears that the trial court made its findings of fact and the order thereon on February 6, 1896, and filed the same February 7, 1896. Subsequently, pursuant to an agreement made between the respective attorneys, amended findings and an order thereon were made by the trial court, and substituted for the original findings, the order bearing date February 21, 1896, and filed February 26, 1896. There was some controversy as to the extent and materiality of the additional findings, but, so long as they stood as the completed findings and final order of the court upon the merits, they must be deemed as the only ones legally in force. The last findings had attached an order for 20 days' stay. The appeal, therefore, could be taken from the order dated February 21, 1896, within 30 days after written notice of the same.

[1] Reported in 69 N. W. 477.

As the order made herein by the trial court is in conflict with the decision of this court made in the case of Wolf v. McKinley, it is hereby reversed, and the case remanded to the district court of St. Louis county, and said court directed to amend its conclusions of law, and cause an order to be entered therein awarding to the defendant William P. Lardner, as assignee of William McKinley, insolvent, the funds in controversy.

MILTON GORTON v. TOWN OF FOREST CITY and Others.[1]

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80 216

December 24, 1896.

Nos. 10,407—(101).

Appeal—Review—Temporary Injunction.

The granting, refusing, or dissolving of a temporary injunction pendente lite rests necessarily in judicial discretion; and, unless there has been an abuse of such discretion, appellate courts will not interfere, especially where the prosecution of an enterprise of a public nature is involved.

Appeal by plaintiff from an order of the district court for Meeker county, Powers, J., dissolving a temporary injunction. Affirmed.

Peterson & Foster, for appellant.

John T. Byrnes, for respondents.

BUCK, J. This action was commenced for the purpose of restraining the defendants from opening a public highway. Upon the verified complaint, a temporary injunction was accordingly issued. The defendants appeared, and served a verified answer, and therein alleged certain facts, which, if true, would justify the court in dissolving the injunction. Plaintiff served a reply, the contents of which were stated upon information and belief, and his verification was to the same effect. The writ of injunction was dissolved and set aside, upon the ground that it was wrongfully obtained, and was issued without reason or sufficient grounds. The issues involved in the action are yet untried, and, if the plaintiff has suffered damages, he is not without a remedy. But the granting, refusing, or dissolving

[1] Reported in 69 N. W. 478.

a temporary injunction pendente lite rests necessarily in judicial discretion; and, unless there has been an abuse of such discretion, this court will not interfere, especially where the prosecution of an enterprise of a public nature is involved. Myers v. Duluth T. R. Co., 53 Minn. 335, 55 N. W. 140.

Order affirmed.

JAMES D. BECKETT v. CAROLINE A. GRIDLEY and Others.[1]

December 24, 1896.

Nos. 10,417—(252).

G. S. 1894, § 5689—Deposition—Notary's Certificate.

G. S. 1894, § 5689, provides that, where the testimony of a witness without the state is taken by deposition, it shall, when completed, be carefully read over to him by the officer taking the same, and thereupon the officer taking such deposition is required to make his return of certain matters regarding such deposition, and attach his certificate thereto, which certificate, it is provided, shall, among other matters, state substantially that such testimony was correctly read over to the witness by the officer before he signed the same. *Held*, that the certificate of a notary public to a deposition taken and returned by him, that the testimony of the witness was carefully read over to him by the notary public before it was signed by the witness, was in this respect a substantial and sufficient compliance with the law.

Sale—Breach of Warranty—Burden of Proof.

Where a horse is sold with a warranty that such horse is capable of fulfilling certain conditions, and which, if not fulfilled, the vendor will replace the horse with another of equal value, or return the notes given for said horse, *held*, that the burden of showing that the conditions were not fulfilled rested upon the vendee, and the vendor was entitled to notice thereof, and an opportunity either to replace the horse with another of equal value, or to return the notes given for the horse.

Appeal by plaintiff from an order of the district court for Stearns county, Searle, J., denying a motion for a new trial, after verdict in favor of defendants. Reversed.

D. W. Bruckart, for appellant.

Geo. H. Reynolds, for respondents.

[1] Reported in 69 N. W. 622.

BUCK, J. The plaintiff brought this action upon two promissory notes, claiming to be a bona fide purchaser. The notes were made payable to H. J. Dresser or order, each for the sum of $500,—one due June 1, 1894, and the other due June 1, 1895; and the complaint alleged that he duly assigned them to plaintiff before due. The answer admits the making and delivery of the notes, and alleges that plaintiff took them after due, with full knowledge of the existence of certain defenses set up in the answer, and that the notes were made for the consideration or price of a Percheron stallion, called Draco, purchased from said Dresser by the defendants, and alleges a warranty by him at the time of such purchase that said stallion, with good care and proper handling, was a good, safe, and sure foal getter, and agreed that, if said horse was not as represented, he would replace him with another imported stallion, of equal value, or return the notes given for said horse. Defendants then pleaded a breach of the warranty, and allege that they have been thereby damaged in the sum of $1,000, which they also pleaded as a defense and counterclaim and set-off, and prayed that said notes might be ordered canceled, and delivered and surrendered up to him.

It appeared that, prior to the making of the notes, another horse had been purchased, and for about the same consideration; that he was not satisfactory, and was returned, and the horse Draco substituted, and these notes were substituted for the notes given as consideration for the first horse. The warranty was in writing, and not disputed; and it appeared that the horse had good care, and the only question which the trial court submitted to the jury was the question as to whether the stallion was a good and sure foal getter at the time of the purchase, instructing them, however, at the same time that, if they found that he was not such good and sure foal getter, then there would be a breach of the warranty, for which defendants would be entitled to damages, and that the measure of such damages would be the difference between what the horse would have been worth if he had been as represented and what he was actually worth in the condition in which he was.

There are only two questions which we need discuss: First, the suppression of Beckett's deposition raised by the sixth assignment of error; second, the construction of the terms of the warranty raised by the seventh assignment of error.

The record in regard to the suppression of the deposition is as follows:

"Plaintiff offered in evidence the deposition of James D. Beckett, taken pursuant to stipulation. Mr. Reynolds: 'I move to suppress the deposition, on the ground that it does not contain the proper statutory certificate.' Stipulation and deposition attached hereto. Which motion the court granted, and defendants excepted."

Counsel for respondents, in his brief, contends that the stipulation was not offered in evidence, but it appears from the record that the stipulation and record were attached, and the notary public certifies that he took the testimony of the witness James D. Beckett, pursuant to the authority and requirements of said stipulation and the interrogations annexed and returned with it. We think it sufficiently appears that it was put in evidence at the time the motion was granted suppressing the deposition.

By the stipulation, it is provided that the official character of Charles L. Norton as such notary public shall be sufficiently proven by his official seal and impression thereof affixed to or stamped upon his return thereto. That this was done sufficiently appears from the record, and all objections to said notary public were expressly waived by the terms of such stipulation, as well as to the issuing of a commission. If he was a notary public, he would be an officer authorized to administer oaths. The point, however, is made that the certificate or return of the notary did not state that the testimony of the witness was correctly read to him. That is true; but the return shows that the testimony was carefully read to the witness.

G. S. 1894, § 5689, expressly provides that:

"The testimony of each witness, when completed, shall be carefully read over by the officer to him, whereupon he may add thereto or qualify the same as he may desire."

The same section, however, provides that:

"Such certificate shall be prima facie evidence of the matters therein stated, and it may be substantially in the following form."

Here follows the form, in which, among other things, it is provided that the certificate shall state "that the testimony of each witness was correctly read over to him." Thus, by express provision of statute, the testimony is required to be carefully read over to the witness, and the certificate must substantially state that it was so

read correctly. The objection that such certificate is insufficient is more technical than meritorious. If it was read correctly, it must have been substantially read carefully to the witness. The objection was therefore not well taken, and the court erred in suppressing the deposition.

By the seventh assignment of error it is contended that the court erred in refusing to charge the jury in regard to the duty of the defendants under the terms of the warranty. Upon this point the plaintiff requested the court to charge the jury as follows:

"That if the horse does not comply with the conditions provided herein, that Dresser, the payee in the note, will replace this animal with one of equal value or return the notes given for said horse, you must find that defendant demanded of or requested said Dresser to replace said horse with one of equal value, in order that you may find a verdict for defendants; and, if this is not shown by the evidence, you must return a verdict for the full amount of said notes in favor of the plaintiff. This request the court refused, and plaintiff then and there duly excepted."

Not only did the court refuse to give this request, but entirely omitted to give any instructions upon the question.

It seems to us that, before the defendants could put the plaintiff or his assignor in default, he should have had notice that the horse Draco did not fulfill the conditions of the warranty, and thus have enabled him to replace this horse with another that would have fulfilled such conditions, or else permitted him to return the notes given for the horse. This option belonged to Dresser. Neither he nor the plaintiff was informed that Draco did not fulfill the conditions, nor were either ever requested to furnish another horse, or to return the notes. The burden of doing this rested upon the defendants, unless there was a waiver, which does not appear in the evidence. The fact that the horse Draco died in the fall of 1894 would not nullify the right of Dresser to replace him with another imported one, of equal value, under the terms of the warranty, or return the notes.

There was no error as to the admission of evidence as to the horse being a good and sure foal getter. See case of St. Paul & M. Trust Co. v. Harrison, 64 Minn. 300, 66 N. W. 980.

Order reversed, and new trial granted.

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q85 84

JOHN HURLEY v. JOHN BENDEL.[1]

December 24, 1896.

Nos. 10,424—(72).

Assignment of Accounts—Validity—Action by Assignee.

H. sold a threshing machine to S. & E., and by parol contract they were to pay H. therefor from the first earnings of the machine. By use of the machine they earned an account of $84 against B., and thereupon they again agreed with H. that he should have and collect such account from B., to apply on their indebtedness to H., of which fact B. had due notice. *Held*, that such agreement operated as an assignment of said account from S. & E. to H.; that it need not be in writing; that H. thereby became the real party in interest, and might maintain an action in his own name for its recovery.

Appeal by plaintiff from an order of the district court for Lac Qui Parle county, Powers, J., denying a motion for a new trial, after an order granting defendant's motion at the close of plaintiff's testimony to dismiss the action. Reversed.

E. T. Young, for appellant.

An assignment of wages to be earned under an existing contract of employment is valid. Likewise where there is no contract of employment for a fixed time. But an assignment of wages expected to be earned in the future, not based on an existing contract, is void. Mulhall v. Quinn, 1 Gray, 105; Lehigh V. R. R. Co. v. Woodring, 116 Pa. St. 513, 9 Atl. 58. But the foregoing applies to earnings of an individual by his manual labor. In this case the question involves the earnings of machinery furnished by the plaintiff, but operated by the buyers. By the contract there was a reservation of all earnings in favor of plaintiff, who was to collect them.

This arrangement was devised to secure the purchase price of the machine. In most cases such security is given in the shape of an "earnings mortgage," so called. Such instruments are valid. Sandwich Mnfg. Co. v. Robinson, 83 Iowa, 567, 49 N. W. 1031; Sykes v. Hannawalt, 5 No. Dak. 335, 65 N. W. 682. This court having adopted the doctrine of potential existence to give effect to a mort-

[1] Reported in 69 N. W. 477.

gage on a crop not yet sown and to a mortgage on after-acquired merchandise, where such intent is manifest, should apply the doctrine to the future earnings of threshing machinery.

H. L. Hayden, for respondent.

BUCK, J. In the fall of the year 1893 the plaintiff entered into a parol contract with Chris Swenson and Albert Englekin, co-partners, whereby plaintiff sold and delivered to them a certain threshing outfit, upon condition that they run the same during the fall, and out of the gross earnings thereof plaintiff should have and be the owner of and collect the first $400 as the purchase price of said machine, and recover the same from the parties for whom said co-partners should do the threshing. They did so thresh during said fall, and in particular for the defendant, to the amount of $84, which sum said defendant agreed to pay for such threshing; and thereupon this plaintiff promptly notified the defendant that he (plaintiff) was the owner of said claim, and the manner in which he became the owner thereof, that he was to collect the same, and demanded of the defendant that he pay said threshing bill of $84 to this plaintiff. At the time of giving such notice to the defendant, plaintiff called Swenson, one of the co-partners, into their presence, and made a statement of his agreement with Swenson & Englekin; and Swenson then said to defendant: "Yes; that was the agreement;" and that plaintiff was to collect the bills. At that time defendant did not promise or refuse to pay the bill, but subsequently promised to pay it if he knew to whom to do so.

There can be no doubt but that he knew to whom to pay the bill, as he was notified to pay it to plaintiff by both plaintiff and Swenson & Englekin. No one else was claiming it, and all parties who had an interest in it, and authority to direct its payment, had agreed that it should be paid to plaintiff, and it was then due and unpaid. At this time the account actually existed. Whether the first agreement between plaintiff and Swenson & Englekin was invalid as an attempt to sell the future earnings of the machine we need not discuss or decide. After the bill or account of $84 was actually earned, the agreement between the parties operated as a valid assignment of it to plaintiff, and, as he thereby became the real party in interest of the account, he had the right to maintain an action in his own name

for its recovery. No particular form of words was necessary. The words used were sufficient to show an intent to transfer the account, and the consideration for so doing was a valuable one. No written instrument was necessary. 1 Am. & Eng. Enc. Law, p. 835. All parties fully understood the transaction, and were bound by it. The plaintiff should be paid his just and legal claim according to the agreement.

Order reversed.

FARMERS NATIONAL BANK OF OWATONNA v. HIRAM BACKUS and Others.[1]

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December 28, 1896.

Nos. 10,166—(173).

Discharge of Receiver—Foreclosure.

In an action to foreclose a mortgage, a receiver pendente lite was appointed to collect the rents of the mortgaged premises and apply them in payment of delinquent taxes and interest due on a prior mortgage. *Held*, that the fact that, pending the action, the holder of the first mortgage had paid the delinquent taxes, added the same to the amount due on his mortgage, foreclosed, and bid in the property for the full amount due him, furnished no ground for the discharge of the receiver.

Rights of Second Mortgagee.

The purchase of the premises by the first mortgagee for the full amount due him operated as a discharge of interest and taxes as between himself and the mortgagor, but not as between the mortgagor and the second mortgagee. It merely increased by that amount the sum which the second mortgagee would have to pay in order to redeem.

Appeal by defendant Burdic from an order of the district court for Ramsey county, Charles D. Kerr, J., denying his application to discharge the receiver and to compel him to account, and directing appellant to deliver possession of the premises to the receiver. Affirmed.

William G. White, for appellant.

Herchmer Johnston and *Robertson Howard*, for respondent.

[1] Reported in 69 N. W. 638.

MITCHELL, J. This case has already been twice before this court. 63 Minn. 115, 65 N. W. 255, and 64 Minn. 43, 66 N. W. 5. After we held that the effect of a supersedeas bond on appeal was to suspend the power of the receiver pending the appeal, the receiver surrendered the possession of the mortgaged premises to Burdic, the grantee of Backus, the mortgagor, who resumed the collection of the rents. After we affirmed the order of the court appointing a receiver pendente lite to collect the rents of the mortgaged premises, the plaintiff moved the court below for an order requiring Burdic to restore possession of the premises to the receiver, so that the latter might resume the collection of the rents in accordance with the terms of the order of his appointment. At the same time Burdic moved the court for an order discharging the receiver, and requiring him to account for the rents he had already collected. The court granted plaintiff's motion and denied that of Burdic, but without prejudice to an application for an accounting at the proper time and upon the proper showing. From this order Burdic appeals.

The grounds upon which Burdic claimed that the receiver should be discharged, and the right to collect the rents restored to himself, were that, after this action was commenced, and after a receiver had been appointed, and pending the appeal already referred to, the holder of the first mortgage had paid up the delinquent taxes and the insurance on the buildings on the premises, added the amount to the sum due on his mortgage, foreclosed, and bid in the property for the full amount, and hence that there are now no delinquent taxes on the premises, and no interest due on the first mortgage, and, therefore, that there is now no use to which the receiver could rightfully apply the rents, and that he has now no further duties to perform.

The effect of the decision affirming the order appointing a receiver was to restore his authority to collect the rents pendente lite, and to determine that he had that right from the date of his appointment. And it would seem to require no argument to show that, if there was, at the commencement of this action, a propriety or necessity for the appointment of a receiver, it still exists with even increased force. The contention that the delinquent taxes on the premises and the interest on the first mortgage have been all paid by the foreclosure of the first mortgage is fallacious. True, they have been discharged as between the mortgagor and the holder of that mortgage, but, as

between the latter and the plaintiff, they have not been paid, but merely added to the amount of the first mortgage, thus increasing by just so much the amount of the prior incumbrance which plaintiff will have to pay in order to protect the second mortgage. It appears that, although Burdic was in receipt of the rents for a considerable time during the pendency of his former appeal, he never applied any part of them to the payment of either the taxes on the premises or interest on the first mortgage, but appropriated them to his own use; and it comes with bad grace from him to now attempt to resume and continue the same course.

It is contended that Burdic was at least entitled to have the receiver account for the rents and profits which he had received. But, as the action is still pending, no reason is apparent why the receiver should be required to account at this time, especially at the instance of Burdic. Even if, as suggested, the receiver did not refund to Burdic all the rents which he collected pending the appeal, the court would not require him to pay these over to Burdic, and then turn around and sue him and his sureties on the supersedeas bond to recover them back. What application should be made upon the final determination of the action of the rents and profits collected by the receiver is not now before us; but we are satisfied that, in case plaintiff redeems from the sale on the first mortgage, he will be entitled to have them applied towards such redemption, at least to the extent of the taxes and interest on the first mortgage included in that sale. Hence, in any view of the case, the court was right in continuing the receivership.

Order affirmed.

AMELIA MORATZKY v. CARL WIRTH.[1]

December 28, 1898.

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Nos. 10,180—(157).

Malpractice—Question for Jury.

This action was brought to recover damages which the plaintiff claims she sustained by the defendant's malpractice, while attending her as a physician during her illness due to a miscarriage, in not seasonably discovering and removing a remnant of the placenta. Evidence considered, and *held*, that the question of the defendant's negligence in the premises was one for the jury, and that the trial court erred in dismissing the action.

Appeal by plaintiff from an order of the district court for Ramsey county, Egan, J., denying a motion for a new trial. Reversed.

N. B. Ferguson, *Norman Fetter*, and *James E. Trask*, for appellant.

Humphrey Barton, for respondent.

START, C. J. The defendant is a physician, and this action is brought to recover damages which the plaintiff claims that she sustained by his malpractice while attending her as her physician. At the close of the plaintiff's case, the trial court dismissed the action, and she appealed from an order denying her motion for a new trial.

We have reached the conclusion, after a careful consideration of the evidence, that the case should have been submitted to the jury. As there must be a new trial, we deem it advisable to refrain from any extended discussion of the evidence, lest we may thereby prejudice the prosecution or defense of the action on the new trial.

The claim of the plaintiff was, substantially, that on the night of October 29, 1891, she was delivered of a five-months old fœtus, and that the defendant from this date until November 20, 1891, was her sole attending physician. On the morning after her delivery, the defendant removed the placenta, but, as plaintiff claimed, he failed to remove the whole of it, and negligently permitted a piece of it, one by two inches long and two-thirds of an inch thick, to remain,

[1] Reported in 69 N. W. 480.

which putrified, whereby blood poisoning and a septic condition of the plaintiff was produced, which greatly increased, intensified, and prolonged her ordinary illness; that the effect of the blood poisoning resulting from the decaying placenta in the body of the plaintiff was to permanently weaken and impair her physical condition, and to cause gangrene in her left leg, which was cut off to save her life. As to the physical condition of the plaintiff at the end of three weeks after her delivery, when another physician was called, there is no dispute. She was then in a very weak, depressed, and somewhat septic condition. Her leg was a blue black, swollen, and in a gangrene condition, and was cut off to save her life. The second physician, on his first visit to plaintiff, found and removed from the mouth of the womb a piece of afterbirth, of the size stated, which was then in a decayed and sloughing condition.

The reasons urged on behalf of the defendant in justification of the order of the trial court in dismissing the action are, briefly stated: (a) That there was no evidence that the blood poisoning commenced after the defendant was called to treat the plaintiff; (b) that there was no evidence that she would not have lost her leg if the defendant had removed the whole of the afterbirth; (c) that his failure so to remove it was not negligence.

It is clear that neither of the two first propositions are justified by the evidence; but assuming, without so deciding, that they are, yet the evidence is practically plenary that the failure to remove the afterbirth materially aggravated and increased the blood poisoning, and prolonged and intensified the plaintiff's pain and sickness. Such being the case, if the defendant was negligent in not removing the placenta, the plaintiff was entitled to damages in some amount, and the case should have been submitted to the jury.

This leaves only the question whether the evidence as to the defendant's alleged negligence in the premises made a case for the jury. Unexplained, the evidence was sufficient to justify the conclusion that the defendant, in the exercise of that degree of care and skill which the law exacts of a physician, might and ought to have seasonably discovered and removed the remnant of the afterbirth.

Order reversed, and a new trial granted.

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ALVA W. BRADLEY v. MICHAEL NORRIS and Others.[1]

December 28, 1896.

Nos. 10,199—(143).

Second Appeal—Law of Case.

Held, that the decision and judgment of this court on a former appeal in this case constitute the law of the case on all points in judgment, and that no questions that might have been raised on such appeal can be considered on an appeal from a judgment entered pursuant to the mandate of this court on the former appeal.

New Trial—Diligence.

A party seeking a new trial on the ground of newly-discovered evidence must show that he could not have discovered the evidence, and produced it on the trial, by any reasonable diligence on his part. Strict proof must be made on this point, and facts, not conclusions, stated in the moving affidavits, from which the court may draw the conclusion that due diligence was used. Rule applied, and *held*, that the trial court did not abuse its discretion in denying defendants' motion for a new trial on the ground of newly-discovered evidence.

Appeal by defendants Michael Norris and Mary Norris from an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial and from a judgment in favor of plaintiffs for $11,084.06. Affirmed.

William B. Phelps and *Warner, Richardson & Lawrence*, for appellants.

Billson, Congdon & Dickinson, for respondent.

START, C. J. This action, which was one to recover damages for a breach of the covenants of warranty and right to convey in a deed of land, was here on a former appeal by the plaintiff from an order denying his motion for a new trial. See 63 Minn. 156, 65 N. W. 357, for a full statement of the facts of the case. Upon such appeal it was held by this court that, upon the facts found by the trial court, there was a breach of the covenants; that the plaintiff was entitled to full damages; that the order appealed from should be reversed, and the case remanded to the district court, with directions

[1] Reported in 69 N. W. 624.

to enter judgment in favor of the plaintiff, and against the defendants, for the amount claimed. Judgment was so entered in this court, and the mandate sent down. Thereupon the district court entered judgment on motion of the plaintiff, but without notice to the defendants, strictly in accordance with the mandate of this court. The defendants appealed from such judgment.

The defendants assign as error on the appeal from the judgment that it was not warranted by the facts admitted by the pleadings and those found by the trial court, because they showed that the plaintiff's cause of action was barred by the statute of limitations. We cannot consider this or any of the defendants' assignments of error on this appeal from the judgment, for the reason that the decision and judgment of this court on the former appeal constitute the law of this case upon all points in judgment. This conclusion does not rest upon the doctrine of stare decisis, but on the same principle as the doctrine of res adjudicata. This court has the right to overrule the decision made on the former appeal in some other case, but in this case it must be followed. Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W. 141; Johnson v. Northwestern T. E. Co., 54 Minn. 37, 55 N. W. 829; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Elliott, App. Proc. § 578.

After the judgment was entered in the district court, the defendants made a motion for a new trial, on the ground of newly-discovered evidence. The defendants appealed from an order denying the motion. The alleged newly-discovered evidence tends to show that the possession of the mortgaged premises by the mortgagee commenced in 1875, instead of 1878, as found by the trial court. If the former was the date of the entry into possession by the mortgagee, the right to redeem was barred; if the latter, it was not; hence the new evidence is material. It is not cumulative, for it relates to a distinct and independent fact, tending to establish the same ground of defense, as the evidence actually received on the trial, but as to which fact no evidence was offered on the trial, for the reason that the existence of such evidence was unknown to the defendants. Layman v. Minneapolis S. R. Co., 66 Minn. 452, 69 N. W. 329.

An order granting or denying a motion for a new trial will not be reversed on appeal unless it is made to appear that the order violated some legal right of the appellant, or was an abuse of discretion, the

presumption being that the discretion was properly exercised. A party seeking a new trial on the ground of newly-discovered evidence must show that he could not have discovered and produced on the trial the evidence by any reasonable diligence on his part. Strict proof must be made on this point. It is not sufficient for a party to state that he used due diligence or his utmost efforts to seasonably discover the evidence, and failed. He must go further, and state facts—tell what he did—from which the court may draw the conclusion that due diligence was used to discover the evidence.

The affidavit of the defendant Norris, so far as it relates to the diligence used to discover the evidence, is in these words:

"That, at the time of the entry of the judgment against the defendants in this action, this defendant had no reason to believe or suspicion that he would be able to discover evidence or establish any earlier possession by said Bierman as mortgagee than that found by the court, i. e. early in the year 1878; that, before the trial of said cause, this affiant spent several months in searching for evidence and witnesses to show the date of the entry by said Bierman on the said land and acts of possession by said Bierman thereon, and that during all of said time affiant exercised the greatest diligence in said search, but was not able to get or obtain any other or better evidence on said point than that introduced on the said trial, nor was affiant able to hear or learn of any evidence or witnesses which would tend to show an earlier possession by said Bierman than the year 1878; that, since the entry of judgment in this cause, affiant has discovered other witnesses, who can and will testify that said Bierman entered upon the said land in the fall of the year 1875."

There was no other affidavit or proof offered on the question of diligence. It is clear that the trial court did not abuse its discretion in denying the motion. The affidavit deals in conclusions, not facts. It fails to state what the defendant did in the premises, or by what happy accident he discovered, so soon after the judgment, some seven witnesses by whom he could establish the fact that the mortgagee entered into possession of the mortgaged premises in 1875. We are not to be understood by this as questioning the good faith of defendant, his counsel or witnesses. But if he had set forth in his affidavit when, where, and how he discovered the witnesses who had escaped his previous search, during several months, made before the trial, the court would have been in possession of important facts bearing directly on the question of diligence. We are not prepared to say that, if the trial court had granted the motion, it would have

been an abuse of discretion; but we do hold that there is nothing in the record to justify the conclusion that the discretion was not fairly exercised; hence the order denying the motion must be affirmed.

Judgment and order affirmed.

STATE OF MINNESOTA ex rel. SECURITY TRUST COMPANY v. PROBATE COURT OF ROCK COUNTY.[1]

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December 28, 1896.

Nos. 10,200—(54).

Decedent's Estate—Presentation of Claims.

Held, that the probate court erred in refusing to allow the relator to present its claim against the estate of the deceased after the expiration of the time limited for the presentation of claims.

January 19, 1897.

Certiorari to Probate Court—Right to Costs.

Pursuant to the order directing the issuing of a writ of certiorari to the probate court, a citation was served upon the opposite party in interest to show cause why the action of that court should not be reversed. The relator prevailed. *Held*, that he was entitled to costs and disbursements against the opposite party in interest, although the writ was directed only to the probate court.

Certiorari to the probate court for Rock county, and James Marshall, judge of said court. Reversed.

Edmund S. Durment, for petitioner.

A. J. Daley, for respondents.

MITCHELL, J. Certiorari to review the action of the probate court in refusing to allow the relator to present its claim against the estate of James Thompson, deceased, after the expiration of the time limited.

Thompson was a resident of Davenport, Iowa, and died testate in that state January 2, 1895, and his will was admitted to probate,

[1] Reported in 69 N. W. 609, 908.

and letters testamentary issued to the executor and an administrator with the will annexed on the 15th of the same month. Thompson having died seised of certain land in Rock county in this state, on February 12, 1895, his will was admitted to probate in that county, and letters testamentary issued to the same persons to whom letters had been issued in Iowa, both being residents of that state. On March 2, 1895, the probate court of Rock county made an order limiting the time for the presentation of claims against the estate to 6½ months, which would expire September 17, 1895. The only notice given of this order was by publication for three weeks in a weekly paper published in Rock county. At the same date the probate court fixed the time for settling the estate at 18 months, which would expire September 2, 1896.

At the time of Thompson's death the relator, a domestic corporation, whose principal place of business was in St. Paul, held promissory notes against him for $10,000 and interest. On March 28, 1895, it presented these notes in the court in Iowa as a claim against his estate, which was duly allowed. On April 16, 1896, the relator presented an application to the probate court in Rock county for leave to file these same notes as a claim against the estate in this state. This application, which was accompanied by due proof of the claim, was in form of affidavits of the secretary and president of the relator, stating, in substance, that neither they nor any other officer of the company had any knowledge or information, until the last of February or first of March, 1896, that Thompson left any property in this state which could be administered on here, or that administration had been or was intended or contemplated being taken out in this state; that, although the president of the relator had several written communications and personal conversations with one of the administrators of the estate relative to its claim, the administrator never stated, or even hinted, that he had been appointed in this state, or contemplated or intended that administration should be had here, or that there was any property of the deceased in this state which could be administered therein; that, after hearing that administration proceedings were being had in Rock county, he consulted an attorney as soon as he could, and by his advice wrote to the probate judge of Rock county to ascertain the facts, and was informed, in reply, on April 2, 1896, that administration had been taken out in that county.

and that the time for presenting claims had already expired; and that thereupon he caused the papers to be prepared and presented, applying for an extension of the time and for leave to present the claim.

The only affidavit opposed to these was one by the Minnesota attorney for the estate to the effect that, in an interview had with the president of the relator about February 14, 1896, on another subject, he made statements to him to the effect that there was certain litigation in the probate court of Rock county regarding the estate. This the president denies, but its only materiality is that, if true, it would tend to prove that he had information which should have put him on inquiry a few days earlier than he had stated in his affidavit. The Iowa administrator, referred to in the president's affidavit, also interposed his affidavit, in which he does not deny any material allegation of the president or secretary.

As reasons, however, why the relator should not be allowed to present its claim in Minnesota, he states (1) that the claim had been presented and allowed in Iowa; (2) that the relator held, as collateral security for the payment of its notes, $10,000 par value of bonds of the St. Paul Investment & Savings Society of St. Paul, Minn., a corporation organized under the laws of this state; (3) that the president of the relator knew that Thompson had assets in Minnesota, and particularly that he was a large stockholder and bondholder in the St. Paul Investment & Savings Society.

But the administrator is significantly silent as to the condition of the estate in Iowa, or whether the assets in that state will pay the claims presented against it in full or any considerable part of them. He is also silent as to the actual value of the bonds held by the relator as collateral. His third allegation also fails to make it appear that Thompson had any personal property in this state which would warrant ancillary administration. The fact that he had stock or bonds in a corporation of this state would not necessarily show that. Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790. And, even if he did, a person would naturally look for such administration proceedings in St. Paul, where the corporation had its place of business, and not down in Rock county. It does not appear that anything has been done in this state by way of selling property, or closing the administration of the estate, or that the allowance of relator's claim will delay the settlement of the estate a single day.

Upon this state of facts we think the probate court erred in refusing to grant the relator's petition. There are some circumstances which naturally tend to create a suspicion that one of the objects of the administration proceedings in Rock county, so far from the domicile of the deceased, and presumably distant from the residence of creditors, was to bar claims, so that this valuable real estate in that county might pass to the devisee free from claims against the estate. The attitude of the parties—one anxious to have its claim allowed in this state and the other earnestly opposing it—indicates, notwithstanding the silence of their respective affidavits, that neither the collateral held by the relator, nor the assets in Iowa, nor both combined, will pay this claim. As the court in Iowa has no jurisdiction of land situated in Minnesota, it is not apparent that there is any way by which that property can be subjected to the payment of relator's claim, except through the probate proceedings in Rock county. The fact that the claim has been presented and allowed in Iowa, or the fact that the relator holds collateral security, are neither of them any legal reason why the claim should not be allowed in this state.

There is nothing tending to show any lack of diligence on the part of the relator, unless it be the lapse of time (six or seven weeks) between its president's first hearing of the probate proceedings in this state and his presentation of this application. But, in extenuation of this delay, it may be suggested that it does not appear that he knew or had reason to suppose, prior to April 2, that the time for presenting claims had expired, or was about to expire, so as to require special haste. But, as was said in Re Mills, 34 Minn. 296, 25 N. W. 631, the same strictness in regard to diligence should not necessarily be adopted in such cases as in case of an application for relief from a default in a civil action, when the rights of the other party are directly involved. The sole object for limiting the time for the presentation of claims is to secure the prompt settlement of estates. In the present case there is not even a suggestion that the granting of relator's application would in any way delay or prejudicially interfere with the settlement of the estate, or cause it any possible injury, except to subject it to the chance of having to pay a just claim. Under the circumstances, to refuse relator the privilege of presenting its claim would be unreasonably harsh.

Order reversed, and the cause remanded to the probate court, with

directions to allow the relator to present and prove its claim within such reasonable time as to the court may seem proper.

The following opinion was filed January 19, 1897:

MITCHELL, J. On appeal of the relator from the action of the clerk in refusing to tax costs in his favor and against the personal representatives of the estate of James Thompson, deceased.

Pursuant to the order directing the issuing of the writ of certiorari, a citation was served on the attorney of the personal representatives of the estate to show cause why the order of the probate court should not be reviewed and reversed. They, and not the probate court, were the real parties in interest. Under these facts, the relator, as the prevailing party, is entitled to have his costs and disbursements taxed against them. G. S. 1894, § 5510, provides that:

"When an action or proceeding is instituted in the name of the state on the relation of any citizen such relator is entitled to and liable for costs and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name."

As costs cannot be taxed against a court, this must mean that they shall be taxed for or against the real party in interest. In another case we refused to allow costs against these same parties, because the writ was not directed to them, and they had never been cited to appear and take part in the proceedings in this court. A subsequent, but cursory, examination of the authorities, leaves us under the impression that in other states it is the practice to tax costs against the real respondents in interest, although they were not cited in, and the writ was directed only to the court or tribunal whose action is sought to be reviewed.

Leaving for future consideration the correctness of this practice, and also whether the better practice is to have the writ directed to both the court and the real parties in interest, or to the court alone, accompanied, as in this case, by a citation to such parties to appear and show cause, we are clearly of opinion that, when either is done, the relator, if successful, is entitled to costs and disbursements.

The clerk is hereby directed to tax costs and disbursements, as contained in the bill presented, in favor of the relator and against Thompson and Lane as executor and administrator of the estate of James Thompson.

JOHN HAY v. EDWARD O. TUTTLE.[1]

December 28, 1896.

Nos. 10,201—(112).

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Insolvency—Security—Conversion.

The acceptance by a creditor from his debtor of a preferential security, voidable under the insolvent law, does not constitute a wrongful conversion.

Same—Action by Assignee.

In the absence of a prior wrongful conversion, the assignee in insolvency has no election to sue for the value of the property. Clerihew v. West Side Bank, 50 Minn. 538, followed.

Same—Nonresident—Comity.

In his complaint, the assignee alleged facts constituting a voidable preference; that he had demanded of defendant a return of the property, which was refused; and asked for judgment for its value. The defendant being a nonresident, plaintiff also caused an attachment to be issued and levied on his property in this state. The defendant appeared in the action, and answered, denying that the transfer of the security was an unlawful preference, and also denying that any demand had ever been made on him for the return of the property. On the trial, the plaintiff failed to prove a demand on defendant, or any conversion of the property by him. *Held* (Start, C. J., and Mitchell, J., dissenting) that, plaintiff having thus compelled the defendant to appear for the purpose of defending his property in an action ostensibly for conversion, it would be a breach of comity, amounting to a fraud on him, to permit the plaintiff to change front, and treat the action as one to set aside the transfer, and for the recovery of the property.

Appeal by defendant from a judgment of the district court for Hennepin county in favor of plaintiff for $960.36, and adjudging that if defendant should return certain shares of stock the judgment should be satisfied in the sum of $905.88, entered in pursuance of the findings and order of Elliott, J. Reversed.

Henry E. Barnes, Jr., and *Selden Bacon*, for appellant.

Arctander & Arctander, for respondent.

MITCHELL, J. This action was brought by plaintiff, as assignee of one Page, under a general assignment for the benefit of creditors.

[1] Reported in 69 N. W. 696.

The right of action was predicated on the fourth section of the insolvent law. G. S. 1894, § 4243. The allegations of the complaint were that, within 90 days of making the assignment, Page, being then insolvent, and the defendant knowing that fact, transferred to defendant certain shares of stock as security for a pre-existing debt, with a view of giving defendant a preference; that, after plaintiff had qualified as assignee, he demanded a return and retransfer of the stock, but that defendant refused to do so. The prayer for judgment was for the value of the stock, and such other and further relief as to the court might seem meet. The defendant being a nonresident, the plaintiff caused an attachment to be issued and levied on his property in this state.

The defendant appeared and answered, admitting the transfer of the stock, but denying that Page was then insolvent, or that defendant knew or had reasonable cause to believe that he was insolvent, and also denying that Page made the transfer with intent to give a preference. As a second defense, the defendant denied that plaintiff had ever demanded a return of the stock, or had ever notified him of any intention to set aside the transfer, or that he claimed the right to do so. The court found the facts in accordance with the allegations of the complaint, including that as to a demand and refusal to return the stock, and ordered judgment against defendant for the value of the stock and costs, conditioned, however, that, if defendant would return the stock, the judgment should be satisfied to the amount of the value of the stock.

The finding that, prior to the commencement of the action, plaintiff had demanded a return and retransfer of the stock, but that defendant had refused to do so, was wholly unsupported by evidence. The only demand attempted to be proved was made on the agent or attorney of the defendant to whom Page had delivered the stock. But it appeared that previously this agent had transmitted the stock to the defendant in Massachusetts, and that his agency in the matter had terminated. There was no other evidence offered for the purpose of proving that defendant had converted the stock. On the contrary, it affirmatively appeared that he still held it. The acceptance of the transfer of the stock from Page did not constitute a conversion of it. That transfer was perfectly valid, except as against insolvency proceedings instituted within 90 days thereafter, in which

case it would be voidable at the instance of the assignee. In the absence of a prior wrongful conversion of the stock, plaintiff had no election to sue for its value. His remedy was to demand a return of the specific property. He would only be entitled to recover its alternative value in case the property itself could not be recovered. Clerihew v. West Side Bank, 50 Minn. 538, 52 N. W. 967.

Nor was this a case, as is often the fact in replevin, where a demand was waived by defendant asserting title to the property in himself; for in this case, treated as an action for conversion, the prior demand and refusal were an essential part of plaintiff's cause of action, for it was all he had to rely on as constituting a conversion. The court, however, treated the action as one to set aside the transfer, and to compel a return of the stock, and for judgment for its value only in case such return was not made by the defendant; for, while the court has inverted the proper order of things, that is what his order for judgment, in effect, amounts to. Such an action could be maintained without any prior demand for a return of the property transferred. Inasmuch as the complaint states facts sufficient to entitle the plaintiff to the relief granted, and as, apparently, all the facts were fully in evidence, the act of the court would, we think, have been perfectly proper had the defendant been a resident of the state, so that jurisdiction of his person could have been obtained in any form or kind of action.

But, upon the facts, there was an important question of comity involved. The defendant being a nonresident, no jurisdiction of his person could be obtained, unless he voluntarily came within the state, or voluntarily appeared in an action. By framing his complaint ostensibly as one for conversion, and attaching defendant's property, as if the action was one for the recovery of money, the plaintiff compelled the defendant to appear, and submit to the jurisdiction of the court, for the purpose of protecting his property against the attachment.

Chief Justice START and myself are of opinion that no rule of comity was violated, inasmuch as defendant did not confine himself to a denial of the conversion, but took issue on all the allegations of the complaint, and asserted the validity of the transfer; and the relief granted was consistent with the case made by the complaint, and embraced in the issues tendered by the answer, and there is no

suggestion that the plaintiff was guilty of any intentional fraud for the purpose of securing jurisdiction of defendant's person. But the majority of the court are of opinion that, defendant having been compelled to appear in order to protect his property from attachment in an action ostensibly for conversion, it would be a constructive fraud upon him, amounting to a breach of comity, to allow plaintiff to change front, and avail himself of defendant's appearance, for the purposes of an action to set aside the transfer of the stock, and for its return, in which the courts of this state could never obtain jurisdiction of defendant's person except by his voluntary appearance; that courts should be very careful to prevent the enforced appearance of a nonresident on one purpose being used for some other and ulterior purpose.

For this reason the judgment is reversed.

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ST. PAUL TRUST COMPANY, Executor, v. NORMAN KITTSON and Others.[1]

December 28, 1896.

Nos. 10,210, 10,219—(184, 185).

Second Appeal—Review.

Upon a former appeal herein, this court remanded this case to the district court, with directions to retry a particular issue, and settle the executor's account in accordance with the decision on such appeal. 62 Minn. 408. This was done, and the parties again appealed from an order denying their respective motions for a new trial. *Held*, that no assignments of error can be considered on this appeal as to matters involved in the first one. *Held*, further, that such retrial and settlement of the account by the district court were in accordance with the mandate of this court.

Appeals by Norman Kittson and others from an order of the district court for Ramsey county, Kelly, J., denying their motion for a new trial and for modification of the findings and conclusions, and by

[1] Reported in 69 N. W. 625.

St. Paul Trust Company, executor, from an order denying its motion for a new trial. Affirmed.

Daniel Murphy, for Norman Kittson and others.

Harvey Officer, for the St. Paul Trust Company.

START, C. J. This matter comes to this court again on cross appeals, by the executor of the will of Norman Kittson, deceased, on the one side, and certain of his devisees and legatees, on the other, from an order denying their respective motions to set aside the trial court's findings on the second trial, and for a new trial.

The subject-matter of the litigation is the third account of the executor. The result of the former appeals was that the action of the trial court in settling the executor's account was affirmed, except as to the amount of money the executor should be charged interest upon. St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 N. W. 74. The district court on the first trial held that, in ascertaining this amount, the entire amount of the average daily cash balances of the executor on deposit in bank should be deducted from the daily average credit balances due the estate, and interest computed on the balance so found. But it appearing from the record, as construed by this court, that the balances in bank were made up of the executor's own money and money belonging to trust estates, including the Kittson estate, of which it had charge, we held, in effect, that, as between the executor and the trust estates, the whole fund in bank might equitably be regarded as belonging to the trust estates, as it appeared that it and the whole thereof was available at all times for the payment of the current expenses and demands of the trust estates, and was so used. It is proper, at this point, in view of what was said by counsel for the executor on the argument of these appeals, to say that in our former decision there was no purpose to hold or state that the executor had used in its own business any part of the funds belonging to trust estates other than the Kittson estate, for there was nothing in the evidence that would justify such a conclusion. Such other estates were referred to only for the purpose of evolving the method of ascertaining the proportionate share of the Kittson estate in the funds in bank, as a basis of ascertaining how much should be deducted from the amount of its credit balances to obtain the amount upon which interest should be charged.

In the original opinion, we held that the proportionate share of the Kittson estate in the funds in bank was 56 per cent.; but, on an application for a rehearing, we became satisfied that we were in error in this respect, and, in a supplemental opinion, we directed the following order to be entered:

"Cause remanded to the district court, with directions to retry the question of the proportion of the daily average credit balance of the Kittson estate to the aggregate daily average credit balances of all the trust estates, and thereupon make a finding upon that issue, and, having made such finding, to modify its conclusions of law, and settle the executor's account in accordance with the rules laid down in the opinion."

Judgment was so entered in this court, and the mandate sent down in accordance therewith, and the issue retried in the district court. On the present appeals both parties assign errors as to matters involved in the former appeals. Such assignments cannot be considered on these appeals, for the decision on the former appeals constitute the law of this case. Bradley v. Norris, supra, 48, 69 N. W. 624.

If the trial court retried the issue, and settled the account in accordance with the decision, judgment, and mandate of this court, the orders appealed from must be affirmed. Only one assignment of error on the part of the executor can be here considered. It is, in effect, that the trial court erred in excluding evidence tending to show that 97 per cent. of the daily average balances to the credit of trust estates other than the Kittson estate was not due, but was awaiting investment, or the happening of the contingencies upon which it was to be paid. The ruling of the court was correct, for it was immaterial whether the credits were then due or not. The fact which the trial court was authorized to determine was "the proportion of the daily average credit balance of the Kittson estate to the aggregate daily average credit balances of all of the trust estates," whether due or not.

The only assignments of error on the part of the devisees and legatees which we can consider are to the effect that the trial court erred in not adding to the total of the daily average credit balances of all trust estates, for the purpose of ascertaining the required proportion, the total of all credits, on the books of the executor, to parties other than the trust estates. Whether it would have been equitable

to have done so it would be now useless to inquire, for such action would not have been in accordance with the decision of this court on the former appeals. The district court tried the issue sent down to it for trial, and settled the executor's account in exact accordance with the mandate of this court.

Order affirmed on both appeals.

F. C. WILEY v. GEORGE H. DEAN.[1]

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December 28, 1896.

Nos. 10,235—(195).

Payment by Note—Findings.

Findings of the court construed to mean that certain promissory notes were taken in absolute payment and extinguishment of a prior indebtedness.

Evidence.

Held, also, that the findings, as thus construed, were justified by the evidence.

Appeal by defendant from a judgment of the district court for Big Stone county, in favor of plaintiff, entered in pursuance of the findings and order of C. L. Brown, J. Affirmed.

Little & Nunn, for appellant.

The receipt of a note in payment of a debt is upon the implied understanding that the note will be paid. Combination S. & I. Co. v. St. Paul S. R. Co., 47 Minn. 207, 49 N. W. 744; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Ligget v. Himle, 38 Minn. 421, 38 N. W. 201; Washington S. Co. v. Burdick, 60 Minn. 270, 62 N. W. 285. The change in the form of evidence of the debt does not affect the mortgage security. Geib v. Reynolds, supra; Foster v. Paine, 63 Iowa, 95, 18 N. W. 699. Leininger had no authority to accept notes in payment of the debts he was collecting. If he had such authority, it

[1] Reported in 69 N. W. 629.

was incumbent on plaintiff to prove it. Brayley v. Kelly, 25 Minn. 160; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; State Bank v. Byrne, 97 Mich. 178, 56 N. W. 355.

F. L. Cliff, for respondent.

A new note may be given in payment and cancellation of an old note, and have the effect of canceling the mortgage securing the latter, if such is the intention. Keough v. McNitt, 6 Minn. 357 (513); Goenen v. Schroeder, 18 Minn. 51 (66); Daly v. Proetz, 20 Minn. 363 (411); Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Combination S. & L. Co. v. St. Paul S. R. Co., 47 Minn. 207, 49 N. W. 744.

MITCHELL, J. Action to enjoin the foreclosure of a mortgage. Stated in chronological order, the history of the case is as follows: In January, 1883, one Lockwood, being the owner of a tract of land, executed two mortgages on it, one to Lawton and one to Kelley. In May, 1884, he executed a third mortgage to one Brown, receiver of the Northwestern Manufacturing & Car Company. This mortgage contained full covenants of title, save that the Lawton mortgage was excepted from the covenant against incumbrances. In February, 1886, Kelley foreclosed, and bid in the property, and afterwards paid off the Lawton mortgage. The property was never redeemed from this sale. In October, 1887, Brown, as receiver, sold his mortgage and the debt secured thereby to the Minnesota Thresher Mnfg. Company, but that company caused the assignment from Brown to be made directly to its "trustee," the Massachusetts Loan & Trust Company. This assignment was not recorded until February, 1895. In September, 1888, Kelley conveyed the land back to Lockwood. In June, 1892, Lockwood conveyed to plaintiff. In June, 1892, one Leininger, acting for the owner of the Brown notes, made a settlement with Lockwood by which those notes were canceled and surrendered, and new notes for $750, payable to the Minnesota Th. Mnfg. Company, taken in place of them. In February, 1895, the Massachusetts Loan & Trust Company, as trustee for the Minnesota Th. Mnfg. Company, assigned to defendant the Brown mortgage, together with the new notes taken by Leininger, and defendant was proceeding to foreclose when plaintiff brought this action to enjoin him, on the ground, among others, that the mortgage had been fully paid and satisfied.

There are only two questions presented by this appeal which we find it necessary to consider: First, do the findings of the court amount to a finding that the new notes taken from Lockwood by Leininger were given and accepted in absolute payment of the notes secured by the mortgage to Brown? and, if so, second, is such finding supported by the evidence? As is correctly stated by the trial court, there is no question of agency in the case. Whatever may have been the precise nature of the powers and duties of the Massachusetts Loan & Trust Company, as trustee for the Minnesota Th. Mnfg. Company, on which the record is silent, it appears that the latter was practically left in possession and control of the Lockwood notes and mortgage for the purpose of collection and settlement. Neither is it important what was the extent of Leininger's original authority, for it conclusively appears that both the Massachusetts Loan & Trust Company and the Minnesota Th. Mnfg. Company fully ratified all that he did in the matter.

The court finds that Lockwood and Leininger "settled and adjusted" the indebtedness represented by the Brown notes, and that Lockwood then made and delivered his other notes "in compromise, settlement, and cancellation" of said indebtedness. Then, again, the court states:

"I regard the evidence and circumstances of the case sufficient to justify the conclusion that the settlement had between the Minnesota Thresher Manufacturing Company and Lockwood amounted to a cancellation and discharge of the Brown mortgage."

While the court does not find, in so many words, that the new notes were given and accepted in payment of the debt secured by the mortgage, yet this, in effect, is what the finding amounts to; and the statement of the court, quoted above, whether considered as a formal finding or not, clearly shows that the language of the previous finding was intended to have that meaning.

The finding, so construed, was justified by the evidence. The circumstances under which these notes were given and taken have a more important bearing upon the question of the intent of the parties than the mere form of words which they used, which neither party may remember accurately. At the time of the settlement the Brown notes amounted to about $2,100, two-thirds of which was barred by the statute of limitations. The mortgage securing the same had been considered for years as worthless, and as having been wiped

out by the Kelley foreclosure. The holder of the Brown mortgage had not considered it advisable to redeem, or worth while even to place the assignment on record. It seems to have been an afterthought, in 1895, that the fact that Lockwood had repurchased the land might have infused new life into the mortgage. It was under these circumstances that the parties got together, compromised and adjusted the matter by the execution of new notes, for about one-third the amount of the old indebtedness, and the surrender and cancellation of the old notes.

While it requires quite strong evidence to overcome the presumption that a promissory note was accepted only as conditional payment, especially where the result would be the release of collateral security, yet in our judgment these circumstances, with others that might be mentioned, taken in connection with the testimony of Lockwood, justified the court in finding that the parties intended this settlement to operate as a payment and extinguishment of the former debt, and that it was never expected or intended that the mortgage should stand as security for the new notes.

Judgment affirmed.

MAMIE LANE v. MINNESOTA STATE AGRICULTURAL SOCIETY.[1]

December 28, 1896.

Nos. 10,236—(154).

Exception to Instructions.

Seven separate requests for instructions to the jury were made by the defendant in this case, several of which were erroneous, and all were refused, except as given in the general charge. The only exception taken to the action of the court was to the effect that the defendant excepts to the refusal to give those portions of the requests which the court refused, and which are not covered by the general charge. *Held*, that the exception was insufficient as a basis for any assignment of error.

Negligence—Race Horse—Track Bolter—Evidence.

The basis of the plaintiff's cause of action was the negligence of the defendant in knowingly permitting a dangerous horse, a track bolter, to run in a race controlled by it, and in which the plaintiff rode and was

[1] Reported in 69 N. W. 463.

injured, without informing her of the vicious character of the horse, of which she was ignorant. On the trial there was evidence tending to show that the horse, to the knowledge of one of the officers of the defendant, would bolt in practice; also that the horse came upon the race track wearing blinkers. *Held*, that it was not error for the trial court to receive evidence to show that a race horse which bolts in practice will usually do so in an actual race; and, further, for what purpose blinkers are put on race horses.

Evidence.

Held, further, that the trial court did not err in sustaining an objection to a question intended to show the position of the horses at the time plaintiff was injured, for the reason the witness had previously fully and clearly testified upon and covered the point.

Appeal by defendant from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial. Affirmed.

Ira B. Mills and *Clapp & Macartney*, for appellant.

Schoonmaker & Fleming, for respondent.

START, C. J. This is the second appeal in this case. See 62 Minn. 175, 64 N. W. 382. The action was brought to recover from the defendant damages for injuries received by the plaintiff, while riding in a running race at the State Fair held September 10, 1891, by reason of the negligence of the defendant. The plaintiff had a verdict for $3,000, and the defendant appealed from an order denying its motion for a new trial.

The specific act of negligence which is the basis of plaintiff's cause of action is that the defendant knowingly permitted a vicious and dangerous horse known as "Isaac B.," a track bolter, to run in the race in which plaintiff rode, without informing her of the unusual danger to which she was thereby exposed, and of which she was ignorant.

1. The first assignment of error is:

"The court erred in refusing to direct a verdict for the defendant, because (a) the case now shows that the defendant is not such a corporation as would render it liable in any event; (b) the evidence is not sufficient to make out a cause of action."

We cannot consider this assignment of error, because it is not supported by any proper exception to the refusal of the court to give the requested instruction. The defendant presented to the trial court seven separate special requests for instructions to the jury, of

which No. 1 was in these words: "That the jury find a verdict for the defendant." The second request was refused, except as given in the general charge; the balance were refused absolutely. It is manifest, from reading them, that several of the requests were properly refused. The exception was to the effect that the defendant excepts to the refusal of the court to give "those portions of the requests which your honor refused, and which are not covered by the general charge." Other than this, there was no exception to the refusal of the court to give the defendant's first request.

The object of an exception is to call the attention of the court to some specific error, so that it may act intelligently in considering it. The exception in question did not call the attention of the court to any specific error in refusing the seven requests, but left the judge to find it out by comparing his general charge with the seven requests. It is claimed by defendant, in support of its exception, that request No. 1 was so inconsistent with any submission of the case to the jury as to render the exception sufficiently specific to comply with this rule. The exception, however, was not to a refusal of the court to give those portions of the requests which were inconsistent with the general charge, but it was to the refusal to give such portions of the requests which were "not covered by the general charge." There were several of the requests which were not covered by the general charge which were erroneous. The exception was insufficient as a foundation for any assignment of error. Carroll v. Williston, 44 Minn. 287, 46 N. W. 352; Steffenson v. Chicago, M. & St. P. R. Co., 51 Minn. 531, 53 N. W. 800; Delude v. St. Paul C. R. Co., 55 Minn. 63, 56 N. W. 461; Webb v. Fisher, 57 Minn. 441, 59 N. W. 537.

2. The second assignment is this:

"The court erred in overruling the defendant's objection to the following question: 'Based upon your experience as a horseman, if a horse is shown to have bolted in practice, will he usually bolt in an actual race?'"

The question was objected to as incompetent and immaterial, and that witness was not qualified to answer it. The objection was overruled. The witness answered substantially in the affirmative. The witness was shown to be competent, and the evidence was material if the subject-matter of the question was one for expert testimony. The habit of "track bolting" in a running horse, and whether, if he

bolts in a practice race, he will be likely to bolt in an actual race, is not a matter of such general knowledge as to exclude expert evidence thereon. There was evidence in the case tending to show that the defendant's secretary and former superintendent at one time owned the horse Isaac B.; that he was an experienced horseman, and well informed as to races and racing horses, and that he knew that this horse would bolt in practice; hence the evidence here in question was material, as tending, in some degree, to show notice to the defendant that this horse was liable to bolt in an actual race. The objection to the question was correctly overruled.

3. The third alleged error is in these words:

"The court erred in refusing to permit the defendant to prove by the witness Antoinette Peteler that she and Miss Poole were close together at a time when Isaac B. was in the lead, and to prove what was said between these two witnesses, and to prove how far Isaac B. was in the lead at that time."

It is necessary, in order to understand the force of the defendant's claim under this assignment of error, to state briefly the relative positions of the horses in the race, and the manner in which the plaintiff claims to have been injured. There were five horses in the running race, which was a mile dash, and the horses started in the following order: Buckthorn, ridden by Antoinette Peteler, had the inside of the track; Little Joe, ridden by Miss Poole, was next; then followed Ethel, ridden by the plaintiff; Dyer, by Mrs. Rush, had fourth place; with Isaac B., ridden by Miss Neal, fifth, or on the outside. These positions were changed before the horses reached the quarter post, at which point the evidence on the part of the plaintiff tends to show that Buckthorn was still in the lead, and that Little Joe and Isaac B. were running close together, the latter on the outside, but a trifle in advance; and when they were between the quarter and five-sixteenth posts, Isaac B. ran against Little Joe, knocking him down, and the plaintiff's horse tumbled over him, whereby she was thrown from her horse, and seriously injured. The defendant's evidence tended to show that Isaac B., at the time of the accident, was ahead of Little Joe, running with Buckthorn, if not leading him; hence he could not have run against Little Joe. The relative position of the horses at the time of the accident was material.

The manifest purpose of the evidence, which this third assignment of error implies was excluded by the court, was to show that Isaac B.

was in the lead at the time of the accident. If it be true that the trial court did exclude evidence of such fact, it was reversible error. But the record shows that the witness Peteler was permitted to testify fully and explicitly to the fact that Isaac B. was in the lead of all the horses at the time of the accident, and how far ahead. This conclusively appears from the following abstract of her evidence:

Q. "Where was Isaac B. at the time this accident happened?" "A. In the lead. Q. Which horse was next to Isaac B. when this accident happened?" "A. Buckthorn,—the one I rode. Q. How far ahead of you was Isaac B. at the time this accident happened?" "A. About two and a half or three lengths,—horse lengths. Q. Did either of the horses ridden by Miss Lane or by Miss Poole come in contact with Isaac B. before or at the time of this accident in that race?" "A. No, sir." "Q. Were you and Miss Lane near together during that race? and, if so, state what took place while you were near together." "A. I can't say where Miss Lane was, but Miss Poole was right next to me. Mr. Schoonmaker: I move to strike out that answer as not responsive. The Court: The first part of it is responsive, and the rest of it isn't. Q. What do you mean by that? A. I recollect that Miss Poole and I were close together— Mr. Schoonmaker: Now, wait a minute. That portion was stricken out. I object to that as immaterial and irrelevant and incompetent. (The objection was sustained. Defendant excepted.) Q. Which one of you—Miss Poole or yourself—had the inside track? A. I did. Q. Was anything said between you and Miss Poole at that time? What was it? (Objected to as immaterial, irrelevant and incompetent. Objection sustained. Exception by defendant.) Q. Where was Isaac B. at that time? (Objected to as incompetent, and assuming something that is not shown in the evidence, and it would be too indefinite, too. Objection sustained. Exception by defendant.) Q. How far in the lead at that time? (Same objection as last before. Objection sustained. Exception by defendant.) Q. For how long a distance after you passed Miss Poole did Isaac B. keep in the lead of you? A. Past the half-mile post. Q. Did you afterwards pass him? A. Yes, sir. * * * Q. Was it possible for Isaac B. to have run against Little Joe from the time that race started until you got to the half-mile post, without your having seen it? A. No, sir. Q. Did Isaac B. at any time run against or come in contact with Little Joe in that race, before you passed Isaac B.?" "A. No, sir. Q. Did Isaac B. come in contact with any other horse in that race, from the starting of the race, until after you had passed him on the track in the race?" "A. No, sir."

Everything which was sought to be proven by the witness was proven by her except what was said between her and Miss Poole. There was nothing in the question, "Was anything said between you

and Miss Poole at that time? What was it?" to advise the court that the conversation between these parties was material. Prima facie it was not, but if, in fact, it were otherwise, it was the duty of the defendant's counsel to indicate to the court wherein it was material. Failing to do so the objection was properly sustained. Bedal v. Spurr, 33 Minn. 207, 22 N. W. 390.

But waiving this, and assuming, for the argument, that what counsel here claims for the evidence sought to be elicited by the question was apparent from its face, still the ruling was right. His claim is that, if the riders of Buckthorn and Little Joe had a conversation after Isaac B. was ahead of both of them, it could not be true that he ran against Little Joe, or that an alleged conversation took place between the riders of Isaac B. and Little Joe. The conversation was not material in and of itself, and it could have been material only so far as it might tend to show that Isaac B. was ahead of all the horses, including Little Joe, at the time of the accident. But this was fully covered by the previous testimony of the witness, who testified directly and absolutely that Isaac B. at this time was in the lead, and 2½ or 3 lengths ahead of all of the horses. The ruling complained of was correct for this reason also. Carlson v. Small, 32 Minn. 492, 21 N. W. 737.

The alleged conversation between the riders of Little Joe and Isaac B., which it is claimed that the answer to the question would tend to rebut, was to the effect that the rider of Little Joe called to the rider of Isaac B., "Pull out your horse," and the latter replied, "I cannot control him." There was no evidence of any such conversation in the case at the time the question was asked of the witness Peteler, and the ruling made. The plaintiff, as a part of her case in chief, offered to show what was said between these riders, but the evidence was excluded on the objection of the defendant. Afterwards, and in rebuttal, the plaintiff did introduce evidence of such conversation. The defendant, however, did not again offer the evidence of the alleged conversation between the riders of Buckthorn and Little Joe.

4. The only other assignment of error which is insisted upon is to the effect that the court erred in permitting a competent witness to state for what purpose blinkers are usually put upon running horses. The answer was that they were put on for two purposes,—one to prevent the horse from bolting, the other to prevent him from swerving

upon the track. Isaac B. wore blinkers in the race, and there was evidence tending to show that they were purchased for him by the secretary of the defendant at the time he owned the horse. The evidence objected to was proper, and the ruling correct, because the purpose of putting blinkers on a race horse is not a matter of general knowledge, and the fact that they are usually put on to keep the horse from bolting was a circumstance proper for the consideration of the jury, in connection with the other evidence, on the question of notice to the defendant of the propensity of Isaac B. to bolt.

Order affirmed.

A. M. KNIGHT v. WILLIAM SCHWANDT.[1]

December 28, 1896.

Nos. 10,262—(196).

Estoppel—Mortgage Foreclosure—Redemption—Equitable Title.

B., a married woman, whose husband had deserted her, owned a tract of land subject to a mortgage which had been foreclosed. Her agent, to whom she had intrusted all negotiations for the sale of her equity of redemption, represented to defendant that her husband was dead. Relying upon this representation, defendant accepted her sole deed, paid her $200 therefor, and subsequently redeemed from the mortgage sale by paying $764, which the purchaser at such sale accepted and retained without objection. Several years afterwards, it having been ascertained that B.'s husband was still living, plaintiff obtained a quitclaim deed from him and his wife, and also another quitclaim deed from the purchaser at the mortgage sale, both for nominal considerations, and upon these muniments of title brought ejectment against the defendant. *Held*, upon these facts, that while the deed from B. to defendant was void, and therefore defendant not a legal redemptioner, yet the redemption by him amounted to an equitable assignment of the interest of the purchaser acquired under the mortgage sale; and that, upon the expiration of the time of redemption, the defendant became the equitable owner of the premises, and the purchaser at the mortgage sale a trustee for him of the bare legal title; and that both B. and such purchaser, as well as plaintiff,

[1] Reported in 69 N. W. 626.

their grantee, who bought with notice of defendant's rights, are estopped from asserting that the redemption by defendant did not thus operate as an assignment.

Appeal by plaintiff from a judgment of the district court for Big Stone county in favor of defendant, entered in pursuance of the findings and order of C. L. Brown, J. Affirmed.

Little & Nunn, for appellant.

F. L. Cliff, for respondent.

MITCHELL, J. Ejectment. One Mrs. Beardsley, a married woman, was formerly the owner of the premises in dispute. The land was incumbered by a mortgage for $500 and interest, executed by her and her husband. Her husband had deserted her and left the country about a year before. The mortgage had been foreclosed, and she was unable to redeem, and for that reason desirous of selling her equity of redemption. She was sojourning at the house of her brother-in-law, one Frazer, to whom she intrusted, and who in fact conducted, all the negotiations for a sale of her interest to the defendant. In the course of these negotiations Frazer stated and represented to defendant that Beardsley was dead, and upon the faith of and in reliance upon such representation, and the consequent belief that Mrs. Beardsley's sole deed would be valid, defendant, on September 29, 1890, accepted her quitclaim deed of the premises, for which he paid her $200. Believing himself to be the owner of the equity of redemption, defendant, on September 25, 1891, paid to the sheriff $764, the amount necessary to redeem, and obtained a certificate of redemption, which was duly recorded.

Without going into particulars, we are satisfied that the evidence, including the subsequent conduct of the purchaser at the mortgage sale with reference to the land, amply justified a finding that it (the Investment Guaranty Trust Company) received, accepted, and retained this money without objection to defendant's right to redeem. It turned out that Beardsley was not dead, but was out in the state of Washington. Thereupon, in February, 1895, the plaintiff procured from Beardsley and wife (the latter living in Wisconsin) a quitclaim deed of the premises, and from Mrs. Beardsley an assignment of the right of action against defendant for the rents and profits of

the land from the time he had gone into possession in 1890. The expressed consideration for this quitclaim was $25. About the same time plaintiff obtained from the Investment Guaranty Trust Company a quitclaim deed of the premises for the expressed consideration of one dollar, and upon these muniments of title brought this action.

Counsel for plaintiff in their brief dwell at some length upon the alleged inconsistent positions taken by the trial court in the line of reasoning adopted in support of his conclusions of law; but this, if true, is immaterial, if the court has arrived at the right result. The contentions of the plaintiff are—First, that the quitclaim from Mrs. Beardsley is absolutely void; second, if the redemption by defendant was effectual to annul the mortgage sale, then he has good title under his quitclaim from Beardsley and wife; third, but if such redemption was wholly nugatory for any purpose, then title ripened in the purchaser at the mortgage sale, and he has good title under his quitclaim from such purchaser. While these positions are plausible, they, in our judgment, are as fallacious as they are inequitable.

It must be conceded that the sole deed of Mrs. Beardsley to the defendant was void. It may also be conceded that she would not be estopped to assert that fact by the representation of herself or her agent that she was a single woman. But there are respects in which a married woman may be estopped by her conduct as well as a single woman. See Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870. It is one thing to hold that she would be estopped by representations that she was single, so as to deprive her of title which she already had, and an entirely different thing to hold that she is estopped by her conduct from acquiring title which, but for such conduct, she never would have acquired. The latter is just this case.

Through the representations of her agent that she was single, defendant was induced, not merely to accept her sole deed, and pay her $200, but also to pay out $764 for the purpose of redeeming from the mortgage sale, but for which all her interest in the land would have been extinguished on the expiration of the time of redemption, two days afterwards. And yet the plaintiff, her grantee, who stands in her shoes, while asserting that her deed to defendant was absolutely void, and hence that defendant was not a legal redemptioner, is claiming the benefit of this redemption as having annulled the mortgage sale, and vested a clear title in his grantor.

Conceding, as we must, that defendant was not a legal redemptioner, it does not follow that his redemption is nugatory as to the purchaser at the mortgage sale, which accepted and retained his money. Under such circumstances, equity will hold the "redemption" either as having the effect of annulling the sale, or of an assignment of the interest of the purchaser at such sale, according as the one or the other will be most equitable, and most for the interest of the party making the so-called "redemption." Under the facts of this case, we have no doubt that equity should, and would, hold it to amount to an equitable assignment, so that, upon the expiration of the time of redemption, defendant became the equitable owner of the premises, and that thereafter the purchaser at the mortgage sale held the bare legal title as trustee for the defendant. Plaintiff, not being an innocent purchaser without notice, stands in no better position. And Mrs. Beardsley, as well as plaintiff as her grantee, is estopped from asserting that such was not the effect of defendant's redemption. Plaintiff has no standing in law, and he certainly has none in good morals.

Judgment affirmed.

ROBERT MORRIS v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 28, 1896.

Nos. 10,279—(146).

Executed Contract—Insanity—Recovery—Disaffirmance—Release.

Where an executed contract has been made in good faith, for a valuable consideration, and without notice of the insanity, with a person who is of unsound mind (but where there has been no inquisition and finding of lunacy), the latter must elect, within a reasonable time after regaining his mental capacity, whether he will affirm or disaffirm the contract; and, if he elects to do the latter, he must return the consideration which he has received. This rule is not changed by the fact that the contract was made and the consideration paid by a third person for the benefit of the other party. Rule applied to a settlement and release of a claim for personal injuries.

[1] Reported in 69 N. W. 628.

Appeal by defendant from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $900. Reversed.

C. Wellington, for appellant.

Frederick L. McGhee and *Stevens, O'Brien, Cole & Albrecht*, for respondent.

MITCHELL, J. This was an action to recover damages for personal injuries caused by the alleged negligence of the defendant. The defendant, among other defenses, pleaded accord and satisfaction, and a release of the cause of action executed by the plaintiff June 12, 1893. The plaintiff, in reply, admitted that he signed such a release, but alleged that at the time of his doing so he was of unsound mind and understanding to such an extent that he did not know or appreciate the meaning, effect, or consequences of it, and that this fact was known to all parties for whose benefit the release was taken.

The plaintiff was in the employ of the Northern Pacific Railroad Company as cook on a business car which was on its way westward. The road of the Northern Pacific Company being obstructed, the car was attached to a train of the defendant, to be hauled over its road. On this trip, owing to a washout on defendant's track, the car was derailed, and the plaintiff sustained the injuries complained of. Plaintiff, thinking he had a claim on account of these injuries against one or both of the companies, employed A. B. Ovitt as his attorney to attend to the collection and enforcement of his claim. Ovitt having informed the claim agent of the Northern Pacific Company of plaintiff's claim, and of his own employment in the matter, the claim agent went to see the plaintiff, but the latter refused to negotiate in person, but referred the claim agent to Ovitt as his attorney, to whom he had intrusted the whole matter. Then followed negotiations between Ovitt and the claim agent, during which the former consulted his client more or less, which culminated in an agreement between the claim agent and Ovitt for a settlement of plaintiff's claim for $375.

It is not very apparent how any liability under any circumstance rested on the Northern Pacific Company, but presumably the reason why it assumed the liability, if any, was because the defendant was

hauling its car for its accommodation. But, however that may be, the terms of a settlement having been agreed on, Ovitt and the claim agent went to plaintiff's house, to close the matter, by having him execute a formal instrument of release, and by the claim agent paying over the money. They found plaintiff at home, and thereupon he executed an instrument releasing both railway companies in full, and the claim agent delivered to him a check for the $375, which plaintiff indorsed and delivered to his attorney, Ovitt, to draw the money on it. Plaintiff, being illiterate, signed the release and the indorsement on the check with his mark, his name being written in both instances by his attorney. We speak of these things as facts, because we do not understand plaintiff's testimony, especially in view of the admissions in his reply, as amounting to a denial that he signed the release, but as meaning simply that, owing to his demented condition at the time, he was unconscious of what he was doing, and hence has no memory on the subject. On the same or the next day Ovitt drew the money on the check, and, after deducting his own fees, deposited the balance in his own name in the Seven Corners Bank.

There is some evidence tending to show that some disagreement arose between plaintiff and Ovitt regarding the settlement, or as to the disposition of the money, but what the exact nature of it was does not clearly appear, but it is probably fairly inferable from the evidence that plaintiff subsequently refused to recognize the settlement, or accept the money from Ovitt; but anything that was done or said in that respect was not communicated to any one except his own attorney. On July 16, Ovitt notified defendant that the money was in the Seven Corners Bank subject to his order, and at his risk. Plaintiff never called for the money, and about August 1 the bank failed. Nothing further appears to have been done in the matter by plaintiff until he brought this action in the spring of 1894.

There is no evidence of any fraud or bad faith on the part of the claim agent of the Northern Pacific Railroad Company who made this settlement, or that he or either of the railroad companies, for whose benefit it was made, had any notice or knowledge of plaintiff's mental incapacity, if any such existed. On the contrary, in view of the doubt that might exist as to whether either company was liable, and the uncertainty existing at that time as to whether plaintiff's in-

juries were either serious or permanent, so far as appears, the settlement was a liberal one on part of the railroad companies, and a judicious one for Ovitt to make in behalf of his client.

Upon this state of facts we find it unnecessary to consider many of the questions discussed by counsel,—as, for example, whether the defendant bore to plaintiff the relation of common carrier, whether the accident raised a presumption of negligence on part of the defendant, and, if so, whether that presumption was conclusively rebutted by the evidence. The evidence as to plaintiff's mental condition presents a rather remarkable case. It does not appear that this insanity had existed, to any marked degree, at least, before this day, or that it continued for any considerable time afterwards. It would seem as if just one day had entirely dropped out of plaintiff's mental consciousness, and by a remarkable coincidence that day happened to be the one on which he signed this release. But such a thing is possible, and the evidence as to his mental condition on that day undoubtedly made a case for the jury.

But, conceding plaintiff's mental incapacity on that day, there is an insuperable obstacle to his recovery in the fact that he has never rescinded, nor offered to rescind, the settlement, but still retains the consideration, and has never offered to return it. He having never been adjudged insane by a court of competent jurisdiction, his contract was not void, but at most merely voidable, at his election. There is no pretense that his mental incapacity continued for any considerable time after the release was executed. Upon recovering his usual mental condition, it was his duty to elect promptly—that is, within a reasonable time—whether he would affirm or disaffirm, and, if he elected to do the latter, it was his duty to restore or offer to restore what he had received, so as to place the parties in statu quo. He cannot affirm in part and reject in part. He cannot escape the burdens of the contract and retain its benefits. Of course, we have no reference to cases where the other party has been guilty of fraud or bad faith in procuring the contract, and the insane person has lost or squandered the consideration before he regained his mental capacity. But the rule is well established that, where an executed contract has been made in good faith, for a valuable consideration, and without knowledge of the insanity (and before office found), the consideration must be returned so as to place the other party in

statu quo before the contract will be avoided. This rule is peculiarly applicable to a case like the present.

The liability of these railroad companies, or either of them, was a disputed or doubtful question. They may not have been, in law, liable at all to the plaintiff. A sum of money is paid to him to settle this disputed or doubtful question. To permit plaintiff to repudiate the settlement and maintain this action without returning or offering to return what he has received, would be to allow him to take his chances of recovering in this action without running the risk of losing what he has received in case he is defeated. The language of Justice Shiras in Vandervelden v. Chicago & N. W. R. Co., 61 Fed. 54, is particularly in point. See, also, Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911; Eaton v. Eaton, 37 N. J. Law, 108; Arnold v. Richmond Iron Works, 1 Gray, 434; Gould v. Cayuga C. N. Bank, 86 N. Y. 75.

It is suggested, however, that plaintiff has never accepted the money, and that it has never come into his hands. The check was delivered to him, and was turned over to his attorney, who did obtain the money on it; and if, by reason of any acts of his attorney, or the failure of the bank in which it was deposited, the plaintiff has lost the money, that is his misfortune, but it cannot change the law of the case.

Finally, it is contended that the money was paid by the Northern Pacific Railroad Company, and not by the defendant, and hence that plaintiff owes no duty to refund anything to the defendant. This contention is entirely fallacious. The settlement was made and the money paid by the Northern Pacific Company for the benefit of the defendant, and, if plaintiff wished to rescind, it was his duty to restore what he had received to the Northern Pacific Company. The fact that the consideration was paid for the benefit of the defendant by a third party does not render it any less plaintiff's duty to refund, or give him any right to retain the consideration, and at the same time repudiate the release of defendant for which that consideration was paid.

A case like the present must be distinguished from one where a party has secured a release in form under the false or fraudulent pretext that it was something else; as, for example, a receipt for money paid as a gratuity. In such case there is nothing to rescind. The

other party may retain the gift, and sue for his damages. And assuming that plaintiff was at the time unconscious of the fact that he was signing a release, there is no evidence that he did not shortly afterwards regain his normal mental condition, and become aware of the nature of the contract which he had executed. It then became his duty to elect promptly whether he would affirm or rescind.

Order reversed.

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WILLIAM A. ANDERSON v. C. N. NELSON LUMBER COMPANY.[1]

December 28, 1896.

Nos. 10,284—(158).

Injury to Employé—Contributory Negligence—Assumption of Risk.

Evidence considered, and *held* to prove conclusively either that plaintiff was guilty of contributory negligence or that he had voluntarily assumed the risks which resulted in his injury.

Duty of Servant.

A servant has no right to neglect to exercise ordinary care for his own safety against open and patent dangers, discoverable by the use of his senses, upon the assumption that the master has done his duty.

Statutory Duty.

The mere fact that a duty is imposed by statute does not change the rules of law as to contributory negligence or the assumption of risks.

Appeal by defendant from an order of the district court for Carlton county, Morris, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $4,000, which was reduced with his consent to $3,000. Reversed.

Stearns, Watrous & Stearns and *H. Oldenburg*, for appellant.

H. H. Hawkins, Alpheus Woodward, and *E. F. Lane*, for respondent.

MITCHELL, J. This action was brought to recover for personal injuries caused by the alleged negligence of the defendant. The plaintiff was employed as a knot sawyer or shingle grader in the

[1] Reported in 69 N. W. 630.

shingle department of defendant's sawmill. The shingle department was on the ground floor of the mill, and the sawyers stood on a raised platform, the floor of which was about four feet above the floor of the mill. The saws were set in a frame or table, on shafts or arbors raised about three feet, or to the height of a man's waist, above and at the side of and parallel with this platform. There were five saws, in a straight line, and about three feet apart, which, when in motion, ran at a high rate of speed, making from 3,000 to 4,000 revolutions per minute.

Directly underneath the saws ran an elevator for the purpose of carrying off the sawdust and other refuse dropping from the saws. This elevator consisted of a leather belt, with cleats on it, and ran in a frame or box built on an incline; the distance from the elevator up to the teeth of the saws being at one end about 4 feet and at the other end, under what we may term the fifth saw, about 22 inches. This elevator ran upward from the first saw towards the fifth saw, and carried the refuse on past the fifth saw out through an opening at the end of the mill. One half the saws, which were circular, was above, and the other half below, the table or frame on which they were set, their under part projecting about 2½ inches below the under side of this frame. This 2½ inches of the saws was open and unguarded. The elevator frequently clogged with refuse, and stopped, so that it became necessary for the sawyers, in the performance of their duty, to take measures to start it again. Sometimes they accomplished this by going to the end of the arbors immediately beyond the fifth saw, where the elevator ran open, and pulling on the belt. If this method failed, as it frequently did, they had to stoop down and crawl under the frame in which the saws were set, and reach down into the elevator box, and loosen the refuse with their hands.

At the time in question, which was about 4 o'clock in the afternoon of June 1, the elevator clogged; and the plaintiff, in the line of his duty, stooped down, and went in under the frame, and reached with one hand down into the elevator box to remove the refuse. As soon as he removed this refuse, the elevator started, when he pulled his hand out quickly to prevent its being drawn in by the elevator, and in doing so it came in contact with the exposed teeth of the fifth saw, and the result was the injuries complained of.

The only negligence charged against the defendant which could

be the proximate cause of plaintiff's injuries consisted in leaving exposed and unguarded that part of the saws which extended below the under side of the table or frame. We think that, under the evidence, it was for the jury to decide whether it was practicable to guard the lower part of the saws, and, if so, whether reasonable care did not require the defendant to do so. But, after a careful examination of the whole evidence, we are satisfied that it conclusively appears that the unguarded condition of the saws and the risks incident thereto were so perfectly plain and obvious to the senses of any man of ordinary intelligence that it must be held that the plaintiff either actually knew and appreciated them or ought to have done so, if he had exercised any sort of reasonable care, and hence that he cannot recover because either of contributory negligence or the kindred doctrine of assumption of risks.

He was not an inexperienced boy. He was 22 years old, had worked in shingle mills for 8 or 10 years, and as a sawyer for 3 or 4 years, and was quite familiar with the machinery in use in shingle mills. He had been working as a knot sawyer in this very mill for about a month. He had previously had frequent occasion to go in under this frame to clean out the elevator, which sometimes clogged up four or five times in a day. He had at different times taken this fifth saw off the arbor or shaft. Any man of common sense would know that, if half of a saw was above the table or frame, the other half must be below. It was perfectly obvious to any one who would use his sense of sight that the lower part of the saws extended below the table and was unguarded.

So far, at least, as the fifth saw was concerned, that fact could be plainly seen from the end without stooping down to look underneath the table. Notwithstanding some evidence to the effect that it was somewhat dark in this shingle mill towards evening on cloudy days, the evidence is conclusive that in the daytime, in any ordinary weather, it was perfectly light in this mill; in fact, it had to be so in order properly to sort the shingles. And, while it might not have been quite as light under the table as it was elsewhere, yet it conclusively appears that it was abundantly so to enable any one who would take the trouble to look to see that the saws were unguarded. Plaintiff himself, as well as his own witnesses, practically admit this. But he says he did not know that the saws were unguarded, because he

never looked to see, and the only reason he gives for not looking is that "he had no particular business to look." Knowing, as he must, that half of the saws was revolving under the table, and having frequent occasion, as he had, to go under there, and place portions of his body in comparatively close proximity to these saws, not to look would seem, under the circumstances, to be the grossest lack of ordinary care. He knew or was chargeable with knowledge of everything connected with the condition of the saws and the risks to himself as fully as were his employers, and yet continued his employment without complaint or objection.

But it is said that he had a right to assume that his employers had performed their duty by guarding the saws. This doctrine is not applicable where the servant knows or is chargeable with knowledge that his master has not performed his duty. No servant can invoke that doctrine as an excuse for his own negligence in shutting his eyes or closing his ears to obvious dangers, and failing to adopt the plainest dictates of common prudence for his own safety.

Some stress is laid upon the fact, as is claimed, that by Laws 1893, c. 7, § 1 (G. S. 1894, § 2248), the duty of guarding these saws was made a statutory one. The fact that a duty is imposed by statute does not change the rules of law as to contributory negligence or to assumption of risks, unless there is some provision in the statute clearly expressing or implying an intention to do so. Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986; O'Maley v. Gas Light Co., 158 Mass. 135, 32 N. E. 1119.

Order reversed, and new trial granted.

CHARLES I. FALL v. CLARION A. YOUMANS and Another.[1]

December 28, 1896.

Nos. 10,310—(147).

Guaranty of Note—Removal of Maker—Duties of Payee.

The defendant transferred to the plaintiff, and guarantied the collection of, a promissory note executed in Wisconsin, of which state the maker was a resident at the time the note was executed. Before the maturity of the note the maker removed from the state of Wisconsin, and became a resident of the state of Illinois. *Held*:

1. That, if the maker had continued to reside in Wisconsin, the plaintiff would have been required to proceed against him in that state, or prove that such proceedings would be wholly fruitless, before pursuing the defendant on his guaranty. The fact that the guaranty was made in Minnesota is not material.

2. But that plaintiff is not bound to follow the maker into the state of Illinois.

3. That the burden is on the defendant to prove that the maker has property in Wisconsin out of which the note might be collected, in whole or in part, and not upon plaintiff to prove that he has not.

Appeal by plaintiff from an order of the district court for Hennepin county, Pond, J., denying a motion for a new trial. Reversed.

Alvord C. Egelston, for appellant.

The contract of guaranty is assignable with the note. Everson v. Gere, 40 Hun, 248. When the maker of a note which is guarantied removes from the state before it falls due, the holder may resort to his action on the warranty without pursuing the maker. White v. Case, 13 Wend. 542; Edwards, Bills, etc. (3rd Ed.) § 335; Daniel, Neg. Inst. (4th Ed.) § 1769a; Cooke v. Nathan, 16 Barb. 342; Mosier v. Waful, 56 Barb. 80; First Nat. Bank v. De Morse (Tex.) 26 S. W. 417; Burt v. Horner, 5 Barb. 501. See Foster v. Julien, 24 N. Y. 28; Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121.

Harrison & Noyes, for respondent.

MITCHELL, J. In November, 1893, at Neilsville, Wisconsin, a Mrs. Rodman executed to defendant a promissory note, payable 18

[1] Reported in 69 N. W. 697.

months after date, no place of payment being specified. In September, 1894, in the state of Minnesota, the defendant sold and transferred the note to plaintiff's assignor, and at the same time guarantied its collection. Plaintiff brought this action against the defendant as guarantor. When the plaintiff rested the court dismissed the action.

Objection is made to the sufficiency both of the complaint and of the evidence, but both involve the same question. The complaint alleged that at the time the note was executed the maker was a resident of Wisconsin, but that before the maturity of the note she removed to the state of Illinois, where she has ever since resided; but it did not allege that she had no property in the state of Wisconsin. The defendant, in his answer, alleged that at the time he transferred the note the maker was, and still continued to be, a resident of the state of Illinois. Upon the trial the plaintiff introduced evidence that, at the time of the transfer of the note and the execution of the guaranty, the defendant represented to him (acting as agent for his mother and assignor in the transaction) that the maker was then a resident of Wisconsin. This admission of defendant was evidence against him that the maker was still a resident of Wisconsin; and, even if she had in fact already removed from that state, yet if the note was purchased and defendant's guaranty accepted in reliance on defendant's statement, the rights and liabilities of the parties must be determined on the basis of its truth.

Further than this, the fact that the note was executed in Wisconsin raised a presumption that the maker was a resident of that state at the time it was executed. Herrick v. Baldwin, 17 Minn. 183 (209). The presumption would be, and the plaintiff would have a right, in the absence of notice to the contrary, to assume, that the maker still continued to be a resident of that state. The guaranty must be interpreted in reference to the situation and condition of the maker of the note, actual or rightfully assumed, at the time the guaranty was made. Hence it would make no difference in the rights and obligations of the parties whether the note was purchased in reliance upon the express statements of the defendant that the maker was still a resident of Wisconsin, or on the assumption, in the absence of notice to the contrary, that she still continued to reside in that state.

Taking the evidence in connection with the admission in the an-

swer, the plaintiff sufficiently proved that the maker of the note had, before its maturity, permanently removed from the state of Wisconsin, and taken up her residence in the state of Illinois; but he introduced no evidence that she did not have property subject to attachment in the state of Wisconsin, and it was on this ground that the court dismissed the action.

This raises the only question in the case, viz. was it necessary that the plaintiff should allege and prove, not only that the maker had removed from Wisconsin, but also that she had no property in that state subject to attachment? It is well settled that, if the maker had continued to be a resident of Wisconsin, the plaintiff would have been required to proceed against her in that state, or prove that such proceedings would have been fruitless, before pursuing the guarantor. The fact that the guaranty was executed in Minnesota is not material. It is equally well settled that if, at the time of the maturity of the note, the maker had removed from the state of Wisconsin, and taken up her residence in another state, the plaintiff would not be bound to follow her into the latter state before suing the guarantor. If, however, it had appeared on the trial that, notwithstanding the removal of the maker from the state of Wisconsin, she still had property in that state out of which the note could be collected, in whole or in part, this would have been a good defense in abatement of this action. But the question is, on which party is the burden of proof? Must the plaintiff prove that the maker has no property in that state, or must the defendant prove that she has?

It is more important that the rules of law in relation to commercial paper should be definite and fixed than that they should be strictly and logically correct on principle. And if a rule be once fully settled by the authorities it ought to be adhered to, even if incorrect in principle. We have not found, nor have counsel referred us to, any case directly in point, on either side of this question, except White v. Case, 13 Wend. 543, which, it must be admitted, is an authority in favor of the defendant. It is to be noted, however, that the particular point here involved, and upon which the decision of that case was made to turn, does not seem to have been raised or discussed by counsel. The question is not discussed at all by the court, and, while the case has been frequently cited with approval on other points, we do not find that it has ever been cited to the particular question now

before us. Edwards and Randolph apparently indorse the doctrine of White v. Case, but cite no other authority supporting it. See Edw. Bills & N. (3d Ed.) § 335; 2 Rand. Com. Paper, § 890. It is worthy of note that, while Daniel cites the case to another point, he is conspicuously silent upon the question involved here. Daniel, Neg. Inst. § 1769a.

Upon this state of the authorities, we feel at liberty to treat the question as one of first impression, and decide it in accordance with what we deem correct principles. In the first place, it is inconvenient, in practice, to require a plaintiff to prove a negative in such cases. The guarantor is presumably better acquainted with the financial condition of the maker than the transferee of the note is, and, if the maker has property in the state from which he has removed, he ought to be able to show it. In the next place, there is no presumption that a man has property in a jurisdiction other than the one in which he resides. In fact, the law usually proceeds on just the contrary presumption. Suppose, for example, the maker of this note had continued to reside in Wisconsin; all that plaintiff would have been required to prove, in order to maintain an action against the defendant, would be the rendition of judgment in that state against the maker, and the issue and return of an execution unsatisfied in the county where she resided. If she had property in any other county in that state, it would have devolved on the defendant to prove it. But why should a different presumption obtain when she has removed to another state, and a presumption be indulged in that she has property, not merely in a county, but in a state, other than the one in which she resides? We are not prepared to say that there may not be cases where the circumstances under which the party left the state might be such as to indicate only a temporary absence, and to raise a presumption that he left his property behind him; but in this case the fact appears that the maker of the note has permanently removed from the state, and taken up her place of residence in another state.

Our conclusion is that all that it was necessary for plaintiff to prove was that the maker had removed from the state of Wisconsin; that, if she left any property in that state, the burden was on the defendant to prove it.

Order reversed, and new trial granted.

D. S. WEMPLE v. NORTHERN DAKOTA ELEVATOR COMPANY.[1]

December 28, 1896.

Nos. 10,319—(168).

Action on Contract—Evidence.

The complaint herein alleged that the plaintiff sold and delivered, at French in this state, to the defendant, a quantity of wheat, for which it agreed to pay, at any future time when demanded, the then market price of wheat of the same grade at Duluth or Minneapolis, less 13 cents per bushel. *Held*, that certain correspondence between the parties did not establish such contract. *Held*, further, that the trial court did not err in dismissing the action on the ground that plaintiff failed to prove such contract.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

Geo. D. Emery and *Houpt & Baxter*, for appellant.

The letters constituting the actual contract upon which the wheat was delivered impliedly assent to plaintiff's assertion that he would not pay storage, and avoid any mention of storage charge on the part of defendant. It was so understood by plaintiff when he delivered the wheat, and could not subsequently be changed by any printed contract tendered him by defendant. The delivery of the printed storage receipts, after the contract made by the letters had been executed by plaintiff, was ineffectual to change the actual agreement. C. Aultman & Co. v. Kennedy, 33 Minn. 339, 23 N. W. 528. The acceptance of the tickets under the representations of the agent did not operate to change the contract. The question whether this was the real contract between the parties was for the jury.

Wilson & Van Derlip, for respondent.

START, C. J. The complaint in this action alleged that on September 2, 1891, the plaintiff sold and delivered to the defendant 3,340 bushels of wheat, upon the express agreement that the wheat should be delivered into the defendant's elevator at French, in the county of Otter Tail, and that the defendant should pay the plaintiff therefor,

[1] Reported in 69 N. W. 478.

at any time when demanded, the market price of the same grade of wheat on the day of the demand in either of the cities of Minneapolis or Duluth, less 13 cents per bushel, and that the wheat, when so delivered, should be the property of the defendant; that the wheat was delivered, pursuant to this contract, on September 2, 1891, and the payment of the purchase price demanded August 1, 1895, which was refused. The answer denied that the defendant ever purchased the wheat on any terms, and alleged that the defendant received the wheat into its elevator for storage, and issued to the plaintiff the usual storage receipts, stating on their face the scale of insurance, storage, elevator, and delivery charges on the wheat, which tickets were accepted and retained by the plaintiff. The reply admits the delivery of the receipts to plaintiff, but denies that they constituted any part of the contract of the parties.

On the trial, at the close of the plaintiff's case, the trial court dismissed the action, for the reason that the plaintiff had not proven the cause of action alleged in his complaint. He appealed from an order denying his motion for a new trial.

The real question in this case is, was the evidence, including that which was stricken out by the trial court, sufficient to justify a finding by the jury that the plaintiff sold and delivered the wheat to the defendant pursuant to the special contract alleged in the complaint? The evidence tended to show the following facts: The plaintiff's brother, D. D. Wemple, had charge of the defendant's elevator at French, with authority to buy wheat or receive it in store for the defendant. If he purchased wheat, he issued a cash ticket for it. If he received it in store, he issued a storage ticket or receipt for it, stating the terms of the bailment. The prices to be paid and the terms of storage were determined by the defendant, and its agent Wemple had no authority to make any change in the usual tickets, or vary the price to be paid from the price list furnished by the defendant more than one or two cents per bushel.

On August 16, 1891, D. D. Wemple wrote the defendant's general manager at Minneapolis for the best terms on which the defendant would handle his brother's (the plaintiff's) wheat. The defendant answered, August 17, in substance, that if the plaintiff would deliver from 2,000 to 4,000 bushels of wheat, it would allow him 13 cents off Duluth or Minneapolis cash price any day he wished to sell after the

wheat was delivered into the elevator. If he accepted the offer, the agent was to wire for cash prices when plaintiff was ready to sell, or issue tickets at list price, and get check for difference later. On August 18 the plaintiff himself wrote to the defendant, asking on what terms he could dispose of his wheat to the defendant, without storage, and with the right to take the price when he got ready to sell, and further stating that he would not pay any storage. The defendant's general manager, on August 19, in answer, sent to the plaintiff the following letter:

"I am in receipt of your favor of the 18th inst., and note contents. In reply, will say we would like very much to handle your wheat, but cannot afford to do it on any better terms than 13 c. off either Duluth or Minneapolis cash price day of sale. It costs us 2 cts. per bushel to handle at the elevator, and 1 ct. per bushel to cover expense at the terminal point, and at the price we have agreed to handle for you, it leaves us about 1 ct. to guaranty weight and grade. We will handle it through the house for you; that is, putting it in special bin, receiving, and delivering on board car, for 2 c. per bushel, not guarantying either weight or grade."

He also at the same time forwarded to the agent at French the following letter:

"I am in receipt of a letter, under date of 18th inst., from your brother in reference to his crop. We cannot afford to handle it for less than 13 c. off either Duluth or Minneapolis cash price any day he wishes to sell after wheat is delivered in our elevator. We will handle it, however, for 2 cts. per bushel; that is, receiving and putting it on board car, not guarantying either weight or grade. These are the best terms we can offer."

There was no evidence tending to show that the plaintiff ever accepted either of the propositions made by defendant in these letters. There was no further communication between the parties as to the defendant's handling or purchasing the plaintiff's wheat, except the conversation hereinafter referred to between the brothers. The plaintiff was advised as to the contents of the two letters from the defendant to its agent at French at the time he delivered the wheat. The wheat was delivered into the elevator, and memorandum receipts given for it, until all was delivered, when the agent made out and delivered to the plaintiff the usual storage tickets of the purport stated in the answer. The plaintiff objected to the tickets, claiming that he had not put his wheat into the elevator for storage, but under an

agreement that he was to have the market price at Duluth or Minneapolis, less 13 cents, on the day of sale, and pay no storage. The agent assured him that such was the case, and that the provision for storage in the receipts cut no figure, as the letters showed the agreement. The letters from the defendant to the agent were exhibited to the plaintiff, who thereupon accepted the receipts containing a contract for the payment of storage at the rate therein named. The plaintiff subsequently borrowed money at the bank, and pledged the receipts as collateral security.

There is no evidence in the case that there was any communication between the parties hereto with reference to the wheat or the receipts from the time the latter were accepted until August 1, 1895, some 3 years and 11 months after their delivery, when the plaintiff demanded of the defendant the market price of wheat of similar grade in Minneapolis on that day, less 13 cents per bushel, but refused to pay or allow anything to be deducted for the storage of the wheat. There is no evidence or claim that the plaintiff did not know the extent of the authority of the agent, his brother, in the premises. On the contrary, the fact that the plaintiff knew that the agent wrote to the defendant for the terms on which it would handle the wheat, and that the letters in the reply were exhibited to the plaintiff, indicates that he knew the extent of his brother's authority. There is no claim of any fraud or deception on the part of the agent.

The plaintiff's claim is that the correspondence between the parties constituted their contract, and establishes the contract sued on. Clearly, such was not the case. The letter of August 19 from the defendant's general manager, which we have quoted in full, distinctly states that the defendant cannot afford to handle the wheat on any better terms than those therein offered. It is also manifest, on the face of the letter, that free storage of the grain for 3 years and 11 months, or for any other considerable time, was not included in the offer.

But, this aside, the letter contained two independent propositions as to the terms upon which the defendant would handle the wheat. The plaintiff accepted neither. Nor was there in the correspondence any accession by both parties to one and the same set of terms, without which there could be no contract. Ames & Frost Co. v. Smith, 65 Minn. 304, 67 N. W. 999. The case of Murray v. Pillsbury, 59 Minn.

85, 60 N. W. 844, relied on by plaintiff is not in point. In that case the agreement to sell was written across the face of the receipts. The evidence shows no contract between the parties concerning the handling of the wheat prior to the delivery of the storage tickets or receipts.

It is claimed by plaintiff that the statement of the agent at the time these receipts were delivered, with the previous correspondence, controlled or abrogated the contract in the receipts for the payment of storage. Nothing can be claimed from the statement or opinion expressed by the agent at the time the receipts were delivered, for he was only authorized to receive the grain for storage or buy it, and issue either storage tickets or cash tickets as the case might be. He was not the defendant's agent to advise the plaintiff as to the legal effect of the letters, or of accepting storage receipts, in view of the previous correspondence of the parties.

The plaintiff having offered no evidence which would justify a finding by the jury that the defendant purchased his wheat, as alleged in his complaint, it follows that the trial court rightly dismissed the action, and that the order appealed from must be affirmed.

So ordered.

CANTY, J. It does not seem to me that the fact of the issuing of the storage ticket is necessarily inconsistent with the idea of an acceptance of the contract giving plaintiff an option to sell the wheat on any day he should elect. Both contracts might stand together, the storage tickets supplying what the other contract omitted, or, possibly, implied,—an agreement to pay storage in the meantime. But plaintiff's contract, giving him an option to sell his wheat on any day on the terms provided, must, if any such contract was made, be read with reference to the course of business. He should have exercised his option within a reasonable time. He failed to do so, and could not exercise it at so late a time as August 1, 1895, four years after the option is claimed to have been given. I therefore concur in the result.

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CHARLES A. COOPER v. SAMUEL L. HAYWARD and Another.[1]

December 28, 1896.

Nos. 10,355—(175).

New Trial.

Held, that there was no error in the court's granting a new trial on the ground that the verdict was not justified by the evidence.

Appeal by defendants from an order of the district court for Stearns county, Searle, J., granting a motion for a new trial. Affirmed.

M. D. Taylor, for appellants.

If W. H. Hayward had an interest in the money, and without making the interest known, and without objection, knowingly allowed his mother to use it in making a gift to his brother, he could not recover. If he had an interest in the money, it was his gift to that extent, and after it was executed it could not be recalled. Stewart v. Hidden, 13 Minn. 29 (43); Lamprey v. Lamprey, 29 Minn. 151, 12 N. W. 514; Furman v. Tenny, 28 Minn. 77, 9 N. W. 172.

G. W. Stewart, for respondent.

Was there evidence to sustain the defense of want of consideration or that of free gift? (1) Upon the undisputed evidence the money was the money of the firm, in which W. H. Hayward had an equal interest with his father. Had the note run to the firm there could have been no question of a want of consideration. The transaction amounted to an agreement by S. L. Hayward on a consideration moving from the firm to pay W. H. Hayward the amount of the money consideration. Such a transaction is enforceable, even if it had not been in writing. Goetz v. Foos, 14 Minn. 196 (265); Sullivan v. Murphy, 23 Minn. 6. Should it be treated as a loan of the firm's money to S. L. Hayward, the same result would be reached. (2) An absolute gift which will devest the donor's title requires a donation on the part of the donor of all his title and interest in the subject of the gift. Irish v. Nutting, 47 Barb. 370; Smith v. Ferguson, 90 Ind. 222. It is as essential an element of a gift as of a contract that the minds of the parties meet. There is not a word in

[1] Reported in 69 N. W. 638.

the testimony to indicate W. H. Hayward intended to give the money; and there is nothing to show that either W. H. Hayward or S. L. Hayward intended it as a gift.

MITCHELL, J. Action on a promissory note executed by the defendants to plaintiff's intestate. Defense, want of consideration. The defendants had a verdict, and the court granted a new trial on the ground, among others, that the verdict was not justified by the evidence.

The evidence was practically undisputed that the deceased, William H. Hayward, was a partner in business with his father, J. E. Hayward, also since deceased; that the defendant Samuel L., being pressed by his creditors, William H. Hayward, at the solicitation of his mother, and without the knowledge of his father, took the moneys, either of the firm or of his father individually (it is immaterial which), which were in his possession and control as his father's agent, and paid the debts of Samuel L., and for the amount thus paid out took defendants' note, payable to himself individually. It is claimed that this money was intended as a gift by the father to the defendant Samuel, but this claim rests exclusively upon what the mother said and did. But it was not her money, and she had no authority to give it away, and the father never knew of the transaction. Whether the money belonged to the firm or to the father individually, it constituted a consideration for the note; and, as the note was made payable to William H. Hayward, he, if living, could, and his personal representative after his death can, maintain an action on it, although the consideration paid belonged to some one else, and the note was taken for the benefit of that person. The father's estate has never made any claim to the note.

As the plaintiff did not, after trial, move for judgment notwithstanding the verdict, it is not necessary to consider whether the court ought to have directed a verdict for the plaintiff. It is very clear, however, that, in view of the evidence, the court committed no error in granting a new trial.

Order affirmed.

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ALFRED CHRISTIANSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.[1]

December 28, 1896.

Nos. 10,360—(118).

Injury to Employé—Proximate Cause—Contributory Negligence—Release.

Evidence considered, and *held* sufficient to justify the jury in finding (1) that defendant's servants were negligent; (2) that such negligence was the proximate cause of plaintiff's injury; (3) that plaintiff was not guilty of contributory negligence; (4) that he had not settled and released his claims against the defendant for damages.

Negligence—Proximate Cause.

Where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not have reasonably anticipated that injury would result in the form or way in which it did, in fact, happen.

Appeal by defendant from an order of the district court for Jackson county, P. E. Brown, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $1,995. Affirmed.

Lorin Cray, for appellant.

L. F. Lammers and *T. J. Knox*, for respondent.

MITCHELL, J. This action, which was here on a former appeal (61 Minn. 249, 63 N. W. 639), was brought to recover for personal injuries caused by the alleged negligence of defendant's servants. The defenses interposed were (1) that defendant was not guilty of any negligence; (2) that plaintiff was guilty of contributory negligence; (3) accord and satisfaction.

The plaintiff was in defendant's employ as a section hand. On the day in question, he and two other section men started easterly on a hand car, to meet their section foreman. In the meantime, another section crew, with plaintiff's section foreman, had started westerly from another point, on another hand car. When the two cars came within a short distance of each other, those on the west-bound sig-

[1] Reported in 69 N. W. 640.

naled those on the east-bound car to go back. Thereupon those on the latter car turned back, and both cars proceeded westerly, the car on which plaintiff was going ahead, and the other car following. It appears from the evidence that those on the rear car had, before starting out that morning, imbibed several drinks of whisky; and that, while both cars were going westerly, some of them once or twice signaled to those on the forward car as if wanting them to go faster. The only significance of this is that it may in part, at least, account for the conduct of those on the rear car.

This part of the railroad was a downgrade of from 52 to 58 feet to the mile, and the track was wet and somewhat slippery. The cars were running down this grade at a rate of speed variously estimated at from 10 to 20 miles an hour. The front car, on which was plaintiff, was of old style, not capable of as great a rate of speed as the rear car; and, owing to the nature of its gearing, the handles attached to the lever moved very rapidly; so much so that it was difficult for one standing on the car to hold on to them. Plaintiff was standing on the rear end of the car, with nothing to hold on to except these handles. The other two men were on the front end of the car where the brake was. The usual distance at which hand cars kept apart, according to the rules of the company, was "three telegraph poles," which would be 540 feet. At the rate of speed at which it was going, the rear car could not have been brought to a stop by the application of the brake in less than 100 feet. The cars had traveled in this way about a mile and a quarter, the rear car gaining on the forward one, until it got within 60 feet of it.

The plaintiff testified that at this point he looked back, and, seeing the other car so near, and going so fast, became dizzy, lost his balance, and fell off. It is perhaps unimportant whether his fall was the result of fright caused by seeing the other rapidly moving car so near, or whether he accidentally lost his hold on the handle of the lever, and lost his balance. The fact is undisputed that he did fall off. We think the evidence shows that, after the men on the rear car saw him fall, they did all they could to stop their car; but going, as they were, at so great a rate of speed, and being within 60 feet of the front car, it was impossible for them to avoid colliding with the plaintiff. The result was that the car ran upon him while lying on the track, and inflicted very severe injuries.

We fail to discover any evidence of contributory negligence on plaintiff's part. The only thing which it is suggested that he ought to have done was to have made some effort to slacken the speed of the car on which he was riding. As the most imminent source of danger would seem to have been the close proximity of the rear car, it is not apparent how this would have helped matters. Moreover, it appears that plaintiff was an ignorant man, with little or no experience in railroad work; and that those on the rear car, of whom his own foreman was one, were signaling the front car to go faster. The very most that can be claimed for the evidence is that the question of plaintiff's contributory negligence was for the jury.

2. That, under the evidence, the question of the negligence of those on the rear car was for the jury, we have no doubt. The usual practice, in accordance with the rules of the company, for hand cars, when going in the same direction, to maintain a distance between them of "three telegraph poles," was founded upon the plainest dictates of common prudence. The faster the cars were going, and the greater the distance required to stop the rear car, the greater was the necessity for the observance of this rule, so as to avoid injury in case of accident to the front car or those riding upon it. But in this case, although the cars were going at a high rate of speed on the downgrade and a slippery track, those on the rear car allowed it to come within only a little over half the distance of the front car in which they could have stopped had any accident befallen the front car or its occupants. The jury were amply justified in finding that, in so doing, the occupants of the rear car were guilty of negligence.

3. The main contention, however, of defendant's counsel, is that, conceding that those on the rear car were negligent, yet plaintiff's injuries were not the proximate result of such negligence; or, perhaps to state his position more accurately, that it is not enough to entitle plaintiff to recover that his injuries were the natural consequence of this negligence, but that it must also appear that, under all the circumstances, it might have been reasonably anticipated that such injury would result. With this legal premise assumed, counsel argues that those on the rear car could not have reasonably anticipated that plaintiff would fall from the car.

It is laid down in many cases and by some text writers that, in order to warrant a finding that negligence (not wanton) is the prox-

imate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this court, but never, we think, where the precise point now under consideration was involved. Hence such statements are mere obiter. The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of Hadley v. Baxendale, 9 Exch. 341. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of "negligence" with that of "proximate cause."

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. 1 Bevan, Neg. 97; Hill v. Winsor, 118 Mass. 251; Smith v. Railway Co., L. R. 6 C. P. 14. For citation of cases on this question, see 16 Am. & Eng. Enc. Law, 436 et seq.; also, Shearman & R. Neg. § 28 et seq.

Tested by this rule, we think that it is clear that the negligence of those on the rear car was the proximate cause of plaintiff's injuries; at least, that the evidence justified the jury in so finding. Counsel admitted on the argument that if, by derailment or other

accident, the front car had been suddenly stopped, and a collision and consequent injuries to plaintiff had resulted, the negligence of those on the rear car would have been the proximate cause. But we can see no difference in principle between the case supposed and the present case. The causal connection between the negligent act and the resulting injury would be the same in both cases. The only possible difference is that it might be anticipated that the sudden stoppage of the car was more likely to happen than the falling of one of its occupants upon the track.

4. The only remaining question is whether the evidence justified the verdict upon the issue of accord and satisfaction.

It stands practically undisputed that, prior to the commencement of this action, the plaintiff received from the defendant $25, and signed a formal instrument in writing releasing and discharging the defendant from all claims or demands, of every name and nature, arising or to grow out of the injuries received by being struck by the hand car. The substance of his testimony is to the effect that he was told that the railroad company was giving him the $25 "because he was poor," or "out of kindness," and that he was told and believed that the paper which he signed was merely a receipt for that sum of money, and that he did not understand that it was a release of his claims against the defendant. This excuse is so often resorted to as a means of avoiding a settlement whenever the party subsequently thinks or is told by some interested party that he has settled too cheaply, that it is always to be scrutinized with great care. The mere fact that a man has made a poor bargain is no ground for setting it aside. Neither can a settlement of a controversy be avoided because of a mistaken conception of its effect by one of the parties, unless it be shown that he was induced to agree to it by some act of the other party which would amount to a fraud upon his rights; and where a party has, for a valuable consideration, executed a solemn instrument of release, there ought to be pretty strong and clear evidence impeaching it to warrant a court or jury in avoiding it.

The evidence tends to show that plaintiff is quite an ignorant man; and, if we are to judge from his testimony contained in the record, so weak intellectually as to be almost imbecile. Whether this is strictly true, or whether his ignorance and forgetfulness were partly simulated for effect, the court and jury, who saw and heard him, were

much better judges than we. Among the injuries which he received were very severe ones on the head; and there was some evidence tending to show that these had impaired his mind down to the time of trial, although it is true that there was evidence to the contrary. When he was injured, he was carried to his boarding place at the house of defendant's section foreman, where he was confined to his bed for about 13 weeks, during which time he was attended by the defendant's surgeon, and waited on by one of defendant's section men, in the capacity of nurse. He was apparently a man without relatives or advisers, and during his long illness does not appear to have come in contact with any one except the physician, nurse, and the section foreman at whose house he was. We do not refer to these facts as implying any wrongdoing on part of the defendant, but merely for the purpose of characterizing plaintiff's condition and surroundings when he executed the release.

It does not appear that he had ever as much as considered the question of his claim against the defendant, or that there had been any negotiations whatever on the subject between the parties. In this condition of affairs, while plaintiff was still confined to his bed, and about six weeks after the accident, the defendant's claim agent went to the section foreman's house with a draft for $25, and a formal instrument of release already prepared, and, through the section foreman as interpreter (for plaintiff could not speak or read English), tendered the $25 for plaintiff's acceptance, and this instrument of release for his signature. Of course, if the defendant was liable at all to the plaintiff, the sum tendered was a most inadequate trifle compared with what he was entitled to. This of itself is not sufficient ground for avoiding a settlement, but we think it is a circumstance entitled to some weight in determining whether there was any fraudulent overreaching or unfair advantage taken of plaintiff's condition in securing his signature to the release, and as to whether he understood that he was releasing all claim against the company. It does not appear that there were any negotiations at this interview as to how much defendant should pay; and although, as already stated, the amount tendered was grossly inadequate if defendant was liable for anything, yet, according to defendant's witnesses, plaintiff accepted it without as much as making a suggestion that he ought to have more.

The strongest evidence against the plaintiff is the testimony of several witnesses that he afterwards made statements to the effect that he had settled with the company, or that, if he had not settled, he could recover big money, etc. Some of these statements he denies, and as to others he testified that he did not remember. But there is one fact which would considerably detract from the force of these statements even if made. Most of them were made after this action was brought, and after the defendant had set up this release as a defense. Hence there is room for the hypothesis that the statements had reference to the effect upon the result of the action of the release by which the company claimed he had settled, rather than an admission as to what he had, in fact, done.

It is impossible, as well as impracticable, to attempt to state all the evidence, direct and circumstantial, bearing on the issue; but our conclusion is that, notwithstanding the testimony of the section foreman, corroborated by the section man, that he did fully and correctly translate and explain the release to the plaintiff, and that he seemed to understand it, the evidence upon the issue of accord and satisfaction made a case for the jury.

Order affirmed.

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WILLIAM E. VEAZIE v. ELISHA MORSE.[1]

December 28, 1896.

Nos. 10,404—(148).

Statute of Frauds — Contract Relating to Land—Performance in One Year.

Defendant had guaranteed the collection of certain notes which he had transferred to the plaintiff, and which were secured by mortgage on real estate; the security, however, being worth only a part of the amount due on the notes. After the notes became due and were dishonored, the defendant orally promised plaintiff that, if he would foreclose the mortgage, and bid in the property for the full amount due, if such foreclosure did not result in the collection of the money by redemption of the premises, he would pay the plaintiff the amount due on the notes and costs

[1] Reported in 69 N. W. 637.

of foreclosure, the property then to be deeded to the defendant. *Held*, that this oral agreement was within the statute of frauds, both as an agreement that by its terms was not to be performed within a year,[2] and also as a contract for the sale of land or some interest therein.[3] Also that it was not taken out of the statute by the fact that plaintiff proceeded and foreclosed and bid in the property in his own name for the full amount due on the mortgage.

Appeal by plaintiff from an order of the district court for Hennepin county, Smith, J., sustaining a demurrer to the complaint. Affirmed.

Harrison & Noyes, for appellant.

Bartleson & Paul, for respondent.

MITCHELL, J. Stripped of surplus verbiage, the material allegations of the complaint are as follows: The defendant being indebted to the plaintiff, the parties made a settlement whereby the plaintiff accepted, and the defendant transferred, or caused to be transferred, to him in payment of this indebtedness, several promissory notes executed by third parties, and secured by mortgages on real estate; the defendant guarantying the collection of the notes thus transferred. The makers of these notes were then, and still are, wholly insolvent, so that nothing could have been collected from them by action. The mortgage security was not worth over one-half the amount of the notes. The notes having become due, and being dishonored, the defendant requested the plaintiff to foreclose, and bid in the premises for the full amount due on the respective notes, at the same time orally promising him that, if such foreclosures did not result in the collection of the money by redemptions from the sales, he would pay the plaintiff the amount due on the notes, according to the terms of the guaranty, with costs of foreclosure, and that plaintiff should then convey to him (defendant) the property thus acquired by foreclosure. Acting upon this request, and for the sole purpose of complying with it, plaintiff foreclosed, and bid in the property for the full amount due on the notes and costs of sale. The time of redemption expired, and none of the property was redeemed. Thereupon plaintiff tendered defendant a deed of the property, and demanded payment of the amount due on the notes and costs of fore-

[2] G. S. 1894, § 4209.

[3] G. S. 1894, § 4213.

closure. Defendant refused to accept the deed, or to pay as demanded.

Upon these facts the plaintiff demanded judgment for the amount due on the notes and the costs expended by him in foreclosing. The defendant demurred on the ground that the complaint did not state a cause of action. From an order sustaining the demurrer the plaintiff appealed.

Briefly stated, the position of the defendant is that the terms of the original contract of guaranty were fully satisfied by the foreclosures and the plaintiff's bidding in the property for the amounts due on the notes, and hence that plaintiff can recover, if at all, only on the subsequent oral agreement; but that this oral agreement is within the statute of frauds, because (1) it was an agreement that by its terms was not to be performed within one year from the making thereof, and (2) it was a contract for a sale of land, or some interest therein.

On the other hand, plaintiff's contention is that the gist of his cause of action is the original guaranty of collection, and not the subsequent oral promise of the defendant to pay at the expiration of the time of redemption if no redemption was made; that the guaranty was not satisfied or discharged by the foreclosures; that in making these foreclosures and bidding in the property he was acting as mere trustee or agent for the defendant; and that the allegations of the complaint as to the oral agreement, and what was done under it, were only material as showing that he had exhausted his remedies against the makers of the notes, or, rather, that defendant had waived his doing so. We are of opinion that defendant's contention is substantially correct.

Considered as an original agreement, the oral promise would clearly be within both clauses of the statute of frauds referred to; and it cannot be any the less so by reason of its being a modification of, or substitute for, the original agreement. It is impossible for plaintiff to recover without resort to this oral agreement. He is confronted at the outset by the fact that the notes have been paid and satisfied by the foreclosure of the mortgages; and the only ground upon which he can now possibly recover is that defendant agreed to take the land off his hands, and pay him what he purchased it for at the mortgage sales.

The fact that plaintiff has performed his part of this oral agreement by bidding in the property for the amount due on the mortgages will not take it out of the statute. There is no ground for treating the plaintiff as the mere agent of the defendant in doing this, so as to enable him to recover on an implied assumpsit, as might be the case if the performance by plaintiff had gone to the benefit of the defendant.

Order affirmed.

JAMES T. WALSH v. JOHN FEATHERSTONE.[1]

January 4, 1897.

Nos. 10,173—(142).

Bond of Indemnity—Construction—Right of Action.

A bond, in which the maker agrees to guaranty the obligee therein named against certain liability, construed to be merely an agreement to indemnify the obligee, and save him harmless from such liability, and not an agreement for the benefit of the third party in whose favor such liability was incurred; and the latter cannot maintain an action on the bond.

Defendant executed to Minor Ball and the Mississippi Land, Loan & Investment Company, a Minnesota corporation, the bond of guaranty mentioned in the opinion. The company named employed one H. Vandervoort to work for it. For his services he recovered judgment for $292.91 against the company on December 26, 1893, in the district court for Hennepin county, on which judgment execution was returned unsatisfied. Plaintiff is the owner of this judgment. From an order of the district court for Hennepin county denying a motion of plaintiff for judgment notwithstanding the verdict, Elliott, J., plaintiff appealed. Affirmed.

F. A. Gilman, for appellant.

A guaranty is a promise to answer for the payment of some debt or performance of some obligation of another party, existing or future. The guaranty here was a promise of the defendant to answer

[1] Reported in 69 N. W. 811.

for the liability of the company to plaintiff's assignor, which is a promise to pay the debt due to his assignor. Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604; Vrooman v. Turner, 69 N. Y. 280. The right of action becomes complete on defendant's failure to do the particular thing he agreed to do, which in this case is to save it harmless from the liability. Smith v. Chicago & N. W. R. R., 18 Wis. 17; Gilbert v. Wiman, 1 N. Y. 550; Belloni v. Freeborn, 63 N. Y. 383; Kohler v. Maetlage, 72 N. Y. 259, at 266–7. The debt or liability existing when the guaranty was made, the duty was absolute. See Hall v. Marston, 17 Mass. 575.

Rome G. Brown, for respondent.

This is a guaranty to indemnify or save harmless. Bausman v. Credit G. Co., 47 Minn. 377, 50 N. W. 496; Weller v. Eames, 15 Minn. 376 (461). This is a purely personal contract. It cannot be enforced by any person save those named in the contract. Campbell v. Rotering, 42 Minn. 115, 43 N. W. 795; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2. Such a contract must be strictly construed. Pioneer S. & L. Co. v. Bartsch, 51 Minn. 474, 53 N. W. 764. Its obligation cannot be expanded by construction or implication. Cushing v. Cable, 48 Minn. 3, 50 N. W. 891; American B. & L. Assn. v. Waleen, 52 Minn. 23, 53 N. W. 867. The following cases show that even the land company could not sue defendant until it had paid the amount due. Weller v. Eames, supra; Bausman v. Credit G. Co., supra; Campbell v. Rotering, supra; American B. & L. Assn. v. Waleen, supra; Administrators v. Warner, 2 Vt. 532; Tate v. Booe, 9 Ind. 13; Lloyd v. Marvin, 7 Blackf. (Ind.) 464; Churchill v. Hunt, 3 Denio, 321. The record shows the judgment was never paid. The appellant's argument is based on the theory that defendant made a contract to pay certain liabilities. The cases cited by him are not applicable to the case of a contract of indemnity.

CANTY, J. The defendant made a bond, or instrument under seal, dated August 1, 1893, by which, in consideration of one dollar and other valuable considerations, he promised as follows:

"I * * * do hereby guaranty * * * Mississippi Land, Loan & Investment Company * * * against any liability by reason of any transaction" of said company "entered into since the fourth day of March, 1890."

The plaintiff had a transaction with said company since that time, to wit, in 1891, by which it became indebted to him in the sum of $292.90, and brings this action to recover from defendant on this contract the amount so due him. On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals. The order must be affirmed.

In the agreement above referred to, defendant does not promise to pay any of the debts of the investment company. His promise to guaranty it against liability is merely an agreement to indemnify it or save it harmless (see Bausman v. Credit G. Co., 47 Minn. 377, 50 N. W. 496), and cannot be construed as an agreement for the benefit of third parties. Even the obligee himself cannot maintain an action on such an agreement until he has paid the claim against which he has by the contract been indemnified. Campbell v. Rotering, 42 Minn. 115, 43 N. W. 795; Weller v. Eames, 15 Minn. 376 (461).

Order affirmed.

On Motion for Reargument.

January 20, 1897.

The motion for a reargument is denied; but whether or not the obligee himself could maintain an action on this agreement is a question as to which there may be some doubt, and one which it was not necessary to pass on in this case. For these reasons the dictum at the end of the opinion stating that he cannot is withdrawn.

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TRADERS' INSURANCE COMPANY v. W. R. HERBER and Others.[1]

January 4, 1897.

Nos. 10,225—(140).

Sufficiency of Evidence.

The statement of a witness as to the existence of a fact, not presumptively within his knowledge, but the existence of which is susceptible of direct proof, *held* to be his mere conclusion, and not evidence on which a verdict can be sustained.

Bond of Insurance Agent—Release of Sureties.

Held, withholding the "commission" of the insurance agents, while permitting them to perform their duties as such agents, did not have the effect, in this case, of releasing the sureties on their bond for the faithful performance of their duties.

Same—Bad Faith of Obligee.

H. was the agent of plaintiff insurance company, and was short in his accounts. He formed a partnership with P. to carry on the agency business, and H. & P. as principals and the other defendants as sureties executed a bond to the company, conditioned for the faithful performance by H. & P. of their duties as such agents. At the time the bond was executed the sureties did not know that H. was in default. In a suit on the bond, *held*, in such cases, it is ordinarily the duty of the obligee in the bond to disclose to the sureties the fact that the principal in the bond is already in default, and a failure to do so is evidence of bad faith, which will discharge the sureties; and whether, in this case, the company was guilty of bad faith in failing to disclose to the sureties that H. was short in his accounts, is a question for the jury.

Appeal by defendants Herman C. Strelow and another from an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial. Reversed.

Benton & Molyneaux, for appellants.

If the creditor conceals from the surety the fact that the principal has been a defaulter, the surety will be discharged. 24 Am. & Eng. Enc. Law, 793; Franklin Bank v. Cooper, 36 Me. 179; Dinsmore v. Tidball, 34 Ohio St. 411; Graves v. Lebanon N. Bank, 10 Bush, 23; Wayne v. Commercial N. Bank, 52 Pa. St. 343; West-

[1] Reported in 69 N. W. 701.

ern N. Y. L. I. Co. v. Clinton, 66 N. Y. 326; Maltby's Case, 1 Dow, 294; Railton v. Matthews, 10 Clark & Fin. 934. Mere noncommunication of material circumstances affecting the situation of the parties is undue concealment, though not willful or intentional. Wayne v. Commercial N. Bank, supra; Railton v. Matthews, supra; Smith v. Governor, 1 Dow, 272. That the agent is in arrears is a fact essential for the surety's information. It is the duty of the obligee to disclose his knowledge of any fact increasing the liability of the surety, or his knowledge of any unfaithfulness of the principal. Bostwick v. Van Voorhis, 91 N. Y. 353; Comstock v. Gage, 91 Ill. 328; Dinsmore v. Tidball, 34 Ohio St. 411; Adjala v. McElroy, 9 Ont. 580; Rapp v. Phœnix Ins. Co., 113 Ill. 390; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, and 11 Pac. 599; Brandt, Suretyship, § 368.

Shaw, Cray, Lancaster & Parker, for respondent.

CANTY, J.[2] This is an action on a bond, dated November 10, 1894, and made to plaintiff by the defendants Herber & Paine as principals and the other defendants as sureties. The condition of the bond so far as it is necessary here to recite the same, is as follows:

"The condition of this obligation is such that, whereas, the abovenamed Herber & Paine have been appointed agents of the Traders' Insurance Company, in Minneapolis, county of Hennepin, and state of Minnesota, who will receive, as such agents, sums of money for premiums, payment of losses, salvages, collections, or otherwise, for goods, chattels, or other property, for the said the Traders' Insurance Company, and are to keep true and correct account of the same, pay over such money promptly, and make regular daily and monthly reports of the business transacted, as required by the rules and instructions of the said company and its officers."

The alleged breach of the bond is that Herber & Paine failed to turn over to the company several hundred dollars of insurance premiums belonging to said company and received by them as such agents. On the trial the court ordered a verdict for plaintiff, and from an order denying a new trial the defendant sureties appeal.

Prior to the date of this bond, the defendant Herber had been the agent of plaintiff at Minneapolis. He and Paine made an agreement to become partners in business as insurance agents, commen-

[2] Buck, J., absent.

cing November 1st of that year, and, with the consent of the plaintiff company, to represent it as such agents in that city. Thereupon the bond in suit was executed, and sent to the company at its principal office at Chicago, and was received by it on November 24; but it refused to issue a commission of agency to the new firm until Herber had paid up all sums due the company from him on the business which had been transacted by him for the company during the preceding month of October, amounting, in all, to $1,297.96. Nevertheless, the new firm had, since November 1, conducted, and still continued to conduct, in the firm name, the business of this company theretofore carried on by Herber.

Matters dragged along until December 5, when the company wrote Herber protesting against the use of the firm name in doing its business at Minneapolis until the October balance was paid. On December 10 he forwarded to the company, of his own funds, the sum of $750. On December 15, by his individual check, he forwarded to the company the further sum of $547.96, which was sufficient to settle for the October business; but it is claimed by appellants that $500 of this last sum was taken out of the funds of the new firm, and is money that they had received as agents for this company for business done by them for it since November 1. If this fact were established, and the $500 were applied as a payment from the new firm, they would owe the company nothing, because, by applying it on the old account of Herber, as it was applied, it leaves the new firm in default to the company only for the sum of $436.52, which is the amount of the verdict.

Paine testified that he never authorized Herber to apply this $500 on his old account, and never authorized the company to do so, but also states that, within a few days after it was sent to Chicago, he knew it was so applied. He also testifies very positively that the $500 check, which he gave Herber out of the firm funds, went to the company as a part of said payment of $547.96; but how he knows this nowhere appears. This payment was made by the individual check of Herber, dated December 15, 1894, at Minneapolis, drawn on the Bank of Minneapolis, in favor of the company, for $547.96, while the payment of the $500 to Herber was made by the check of Herber & Paine, dated December 18, 1894, at Minneapolis, drawn on the Security Bank of Minnesota in favor of Herber. It will be observed

that the latter check is dated three days later than the former, and is drawn on a different bank. Neither does it appear that the latter check was ever indorsed by Herber or deposited in the Bank of Minneapolis, on which the former check was drawn by him.

Herber was called as a witness for defendants, and examined at length; but he was never asked, and never stated, what use he made of the $500 check, or what he did with it. We have no evidence on this point except the naked statement of Paine, above mentioned. Paine stated nothing that he saw and nothing that he did as respects this check, except that he gave it to Herber. How Herber applied the check is not presumptively within Paine's knowledge. Then we must hold that Paine's statement as to how the check was applied by Herber is a mere assumption or conclusion of the witness, drawn, perhaps, from hearsay, or from facts or circumstances not disclosed in evidence. Such a statement is not evidence on which a verdict can be sustained, and therefore there is no evidence in the case to show that this $500 check or its proceeds ever went to the company. Then it is unnecessary to consider whether or not, if it appeared the company had received this $500, it could be compelled, as between it and these sureties, to apply the same on the account of Herber & Paine.

2. There is nothing in the claim that the holding back of the commission of agency of the new firm changed the terms of the contract of agency, so as to release the sureties on the bond. All parties seem to have proceeded to perform this contract from the time it was made, and the holding back of the written evidence or commission of agency did not in any manner change the terms of the contract.

3. At the time of the execution of this bond, Herber was indebted to the company in the sum of $1,900 for insurance premiums received by him on business done in the months of September and October. The defendant sureties offered to prove that they had no knowledge of this fact, the offer was refused, and they assign this as error.

Their answer sets up this defense, but it only alleges Herber to be in default in the sum of $600. However, the evidence that he was in default for $1,900 was received without objection. It is contended by appellants that it was the duty of the insurance company to disclose to them that Herber was thus in default, and that the failure of the company to do so amounted to fraud upon them, which

will prevent a recovery on the bond; citing 24 Am. & Eng. Enc. Law, 793, and a number of cases therein cited, and also other cases, many of which hold that, in such cases, it is the duty of the obligee in the proposed bond to disclose to the sureties on the bond that their principal is already in default to such obligee, and that the failure of the latter so to notify the sureties is a fraud upon them.

In answer to this, respondent shows that it appears by the uncontradicted evidence that Herber told the secretary of the company, before the bond was executed, that he would receive sufficient from Paine to "square up his indebtedness" to the company; that, in the letter from Herber to the company of October 20, announcing that the new firm was to be formed, he stated:

"All balances due companies from their present agent will be paid up, and remittances will be more prompt than in the past."

And that it sufficiently appears that the officers of the company had no communication with the sureties on the bond at all, such sureties being in Minneapolis and such officers being in Chicago during the time of the transaction, and that the bond was voluntarily executed and forwarded to the company at Chicago.

Undoubtedly, all of these circumstances should be taken into consideration in determining the good faith of the company in accepting this bond without disclosing to the sureties that Herber was thus in default. But it should also be taken into consideration that the company had good reason to know that Herber had collected insurance premiums which he had not turned over, was short in his accounts, and might not be able to make up this shortage except in the manner proposed,—by taking in a partner who had agreed to pay Herber for the privilege of being admitted into the business; that the shortage in the accounts of Herber was not made up until five or six weeks after the new firm commenced business, and two or three weeks after the bond was delivered to the company; that in the meantime the company held back the commission because this old balance was not made up, though it knew that the new firm was doing business for it, and still it did not disclose any of these facts to these sureties, though it apparently took the position that it had not accepted the bond, as it had not issued the commission. We are of the opinion that, under all the circumstances of the case, the good

faith of the company in failing to disclose to these sureties the fact that Herber was short in his accounts with it was for the jury, and it was error to direct a verdict for plaintiff.

The order appealed from is reversed, and a new trial granted.

J. M. DIMENT v. H. M. BLOOM.[1]

January 4, 1897.

Nos. 10,254—(92).

Dismissal—Failure of Plaintiff to Appear.

Where the answer does not set up a counterclaim, and the plaintiff fails to appear at the trial, the court may dismiss the action on defendant's motion; but it is error to try the case in the absence of plaintiff, and award defendant judgment on the merits.

Appeal by plaintiff from a judgment of the district court for Ramsey county, in favor of defendant, entered in pursuance of the findings and order of Egan, J. Reversed.

Wheelock & Sperry and *A. C. Hickman*, for appellant.

Albert B. Ovitt, for respondent.

CANTY, J. This action was commenced in the municipal court of Owatonna, and it does not appear how the case found its way to the district court of Ramsey county, where it was tried and judgment rendered for defendant. The plaintiff appeals from that judgment, but on such a record he cannot raise the question that the action was wrongfully removed from said municipal court.

The case was called for trial in said district court, the plaintiff failed to appear, and thereupon, in the absence of plaintiff, the defendant proceeded to try the case on the merits, and introduced evidence to prove his version of the transaction in question. The court made findings of fact and ordered judgment on the merits in favor of defendant, which was entered. The action is for the recovery of money claimed as rent. The answer does not contain any counter-

[1] Reported in 69 N. W. 700.

claim. Under these circumstances, it was error for the court to order any judgment but that of dismissal. Keator v. Glaspie, 44 Minn. 448, 47 N. W. 52.

The judgment is reversed, the findings of fact set aside, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

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BOARD OF COUNTY COMMISSIONERS OF ST. LOUIS COUNTY v. AMERICAN LOAN & TRUST CO. and Others.[1]

January 4, 1897.

Nos. 10,294—(166).

County Funds—Bond of Depositary.

Section 730, G. S. 1894, provides that the bond of a depositary of county funds shall be made payable to the county. The bond in question was made payable to the "board of county commissioners." *Held* a mere irregularity, which did not invalidate the bond.

Same—Approval—Pleading.

In an action on such a bond, the complaint does not allege that the principal in the bond had ever been designated as such a depositary, except as this can be inferred from a recital in a copy of the bond set out as an exhibit, by which it appears that the bond was approved by the board of county commissioners 18 days after its date. *Held*, in view of said section 730, which requires the bond be approved and deposited with the county treasurer before the depositary is designated, the complaint does not sufficiently allege that any designation of the depositary had ever been made before the bond was so approved, and, as the complaint does not state that any county funds were deposited with such depositary after the approval of the bond, no cause of action is stated, and the complaint is demurrable.

Appeals by defendants Bradley and others from an order of the district court for St. Louis county, Moer, J., overruling separate demurrers to the complaint. Reversed.

R. R. Briggs, *Washburn*, *Lewis & Bailey*, *Cash*, *Williams & Chester*, *A. A. Harris & Son*, and *W. W. Sanford*, for appellants.

[1] Reported in 69 N. W. 704.

George E. Arbury, *C. A. McPherrin*, and *Wm. B. Phelps*, for respondent.

CANTY, J. This is an action on a bond executed to "the board of county commissioners of St. Louis county in state of Minnesota," by the defendant trust company as principal and the other defendants as sureties. It recites that the trust company "has been duly designated a depositary of the funds of said county of St. Louis for the term of two years from the date hereof," and is conditioned that the trust company "shall well and truly pay over on demand, according to law, all of said funds which shall be deposited," and interest thereon. The defendant sureties demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and appeal from an order overruling the demurrer.

1. Section 730, G. S. 1894, provides that the bond of a depositary of county funds shall be payable to the county, and appellants contend that, as this bond is payable to the "board of county commissioners," it is void. We cannot so hold. The intention to indemnify the county is plain, and the defendants cannot escape liability on their voluntary obligation on any such a technicality. Any one would understand from the bond that it was given for the benefit of the county.

2. It is contended by appellants that it does not appear from the complaint that any county funds were delivered to the trust company after this bond was approved by the board of county commissioners, as provided by said section 730, and that, therefore, the complaint does not state a cause of action.

The bond is dated April 18, 1892; the sureties acknowledged it on April 23; and it appears, by the indorsement on the back of the bond, as the same is set out as an exhibit to the complaint, that the board of county commissioners approved the bond May 6, 1892. The complaint alleges that the bond was executed and delivered on April 18. It further alleges:

"That at the time of the execution and delivery of said bond as aforesaid, the said E. J. Crossett, as such county treasurer, had deposited with, and did thereafter deposit with, the said American Loan & Trust Company aforesaid large sums of money, which were then and there the moneys of the said county of St. Louis aforesaid, and that, after the execution and delivery of said bond as aforesaid, the said E. J. Crossett did deposit with the said defendant the American Loan & Trust Company large sums of money, which were then and

there the moneys of said county of St. Louis, and all of which moneys had come into the hands of him, the said E. J. Crossett, and were then and there intrusted to him by virtue of his said office as said county treasurer as aforesaid."

The complaint further alleges that on July 14, 1893, there was on deposit with the trust company, "of the moneys so deposited," the sum of $106,141; that the county treasurer on that day demanded the same from the trust company, but the latter failed and refused to deliver the same to such treasurer.

While the complaint alleges that the bond was executed and delivered on April 18, it appears that it was not approved by the board until May 6. In the meantime the bond was inchoate, was not accepted, and, in law, there was no delivery of it. People v. Van Ness, 79 Cal. 84, 21 Pac. 554; Bank v. Cooper, 36 Me. 179, 193. How much of these county funds were delivered to the trust company before the execution of the bond on April 18 does not appear. Neither does it appear that any of the funds were so delivered after the bond was approved by the board on May 6. Section 731, G. S. 1894, provides:

"All bonds required under the provisions of this act shall be given for the term of two years from the date of their execution, and shall be renewed every two years thereafter."

It does not appear that this is a renewal bond, or that the funds so deposited before its execution were deposited during a prior two-year term. Whether this bond would secure the repayment of funds deposited during such a prior term we need not decide.

It must be held, from the complaint, that the county treasurer deposited county funds with this trust company before the date or execution of the bond, and before there was any shadow of claim that the trust company had been designated as a depositary at all. We cannot hold that this bond secures the repayment of such funds. It recites that the trust company was designated as a depositary "for the term of two years from the date hereof," and secures the repayment of "funds which shall be deposited."

The next question is, does the bond secure the repayment of funds deposited with the trust company after the bond was executed and before it was approved by the board? There is no allegation in the complaint that the trust company ever was designated a depositary, unless the recital in the bond so set out as an exhibit is such an allegation. Said section 730 provides:

"Before any national, state or private bank or banker shall be designated as such depositary, such bank or banker shall deposit with such treasurer a bond payable to such county, and signed by not less than five freeholders of the state as sureties, which bond shall be approved by the board of county commissioners * * *."

This requires that the bond so approved shall be deposited with the county treasurer before the depositary is designated. In view of this statute, we cannot hold that such recital, in the yet unapproved and inchoate bond, that the trust company "has been duly designated a depositary," etc., is a sufficient allegation in the complaint that it has been so designated. Then, conceding, without deciding, that if the trust company had on April 18, the date of the bond, been designated as a depositary, and that, under the rule laid down in Board of Commrs. of Hennepin Co. v. State Bank, 64 Minn. 180, 66 N. W. 143, this irregular designation would have been sufficient to make the trust company a de facto depositary, and the sureties on this bond liable for deposits made thereafter and before the approval of the bond, still it is not sufficiently alleged in the complaint that the trust company was designated a depositary on April 18, or before the approval of the bond.

The statute does not contemplate that the depositary shall, as a mere bailee, keep in specie, distinct from its own funds, the county funds so deposited with it. Then the allegation in the complaint that the funds in question were on deposit with the trust company on July 14, 1893, cannot be construed as meaning that the trust company had never used these funds, but had always kept them in specie, or separate and apart from its own funds; and we cannot presume that it had so kept those county funds until after the bond was approved. What effect it would have on the decision on this appeal if these allegations could be so construed, or we could so presume, it is not necessary to consider.

The order overruling the demurrer to the complaint is reversed.

FRANK E. MIX v. JAMES H. EGE, Sheriff.[1]

January 4, 1897.

Nos. 10,314—(187).

Evidence—Redirect Examination.

Certain evidence, given on redirect examination, *held* competent as explaining more fully a fact brought out on cross-examination, and as showing all the transactions of the plaintiff and his vendor in regard to the property purchased.

Same.

Certain other evidence, given on redirect examination, *held* competent to rebut an inference which might be drawn from the cross-examination.

Fraudulent Conveyance—Evidence.

The issue in this action was whether the property in question was transferred to the plaintiff to defraud creditors. *Held*, under the circumstances, it was not error to refuse to receive in evidence the records in an action brought by another creditor of the alleged fraudulent vendor, in which action a writ of attachment (prior to that sued out by defendant) was issued, and levied on some of the same property, just after plaintiff had taken possession of it.

Same.

Under a claim that the property had been sold by the debtor to M., and by M. to plaintiff, *held*, it was not error to receive in evidence the bill of sale from the debtor to M.

Bona Fide Purchaser.

Held, defendant's first request to charge ignores the fact that M. may have been an innocent purchaser, whose rights plaintiff may have acquired, and was therefore properly refused.

Rulings.

Other unimportant rulings considered.

Appeal by defendant from an order of the district court for Hennepin county, Belden, J., denying defendant's motion for a new trial, after a verdict in favor of plaintiff for $40. Affirmed.

Jayne & Morrison, for appellant.

John W. Gilger, for respondent.

CANTY, J. This is an action of replevin. In his answer, defendant denies that the goods and chattels in question are the goods of

[1] Reported in 69 N. W. 703.

plaintiff, but alleges that they are the goods of one Feldman; that defendant, at the time of taking the same, was sheriff of Hennepin county, and took them on a writ of attachment issued out of the district court of that county in an action wherein Noyes Bros. & Cutler are plaintiffs and Feldman is defendant. On the trial plaintiff had a verdict, and from an order denying a new trial defendant appeals.

Feldman had been the owner of the goods and chattels in question, consisting of a stock of cigars, tobacco, and store fixtures, with which business was being carried on in a retail store. Plaintiff claims that Feldman sold out to one McGuire, who two days afterwards sold to plaintiff. Immediately thereafter a writ of attachment was levied on the property in an action brought by one Grosse against Feldman.

1. On the redirect examination of plaintiff as a witness on his own behalf on the trial, the court permitted him, against objection and exception, to testify that he then "made a kick to McGuire," who stated that this attachment would not hold, that he would fight it, and that he further stated:

"We have got a lot of goods here. Let them take these cigars—Let them take out that much, and I will guaranty we'll get the goods back, or I'll give you credit for them."

This is assigned as error. We are of the opinion that it was competent, for two reasons: (1) The defendant had already gone into the same matter on cross-examination, and (2) this evidence showed more fully the transaction between plaintiff and McGuire in relation to the stock of goods and fixtures in question.

2. On cross-examination, plaintiff testified that when he bought the property he was engaged with the National Cash-Register Company, and could not run the cigar store himself, but employed another as clerk. On redirect examination he testified, against objection and exception, that at the time he purchased the property he expected his relations with the company would cease; that he had an intimation to that effect. This is assigned as error. It was competent to explain the cross-examination, and rebut any inference of bad faith on his part in purchasing a business which, by reason of his employment elsewhere, he could not personally manage.

3. Defendant offered in evidence the records in the case of Grosse v. Feldman, and the court rejected the same. We cannot say that this was error. The writ of attachment in that case was levied, and

the property levied on carried away by the police officer, three days before the writ in the Noyes Bros. & Cutler case was issued or levied on the remainder of the property by the sheriff. It was competent to show the prior attachment, and the acts and conduct of plaintiff in reference to the same.

But the only theory on which the records in that case could have been competent evidence in this is that before plaintiff parted with the consideration for his purchase he had obtained sufficient knowledge of the charges made in the Grosse case to put him on inquiry, and that, if he had inquired, he would have discovered that Grosse's affidavit of attachment in these records charged that Feldman was about to dispose of his property with intent to defraud his creditors. Plaintiff testified that he had already given his negotiable promissory notes to McGuire for the full amount of the purchase price, but had not yet given the mortgage to secure the same, when the Grosse attachment was levied. Plaintiff was not learned in the law, and does not appear to have consulted an attorney in reference to the Grosse attachment. McGuire took the matter off his hands, and gave him credit for the amount of goods seized on that attachment, and indorsed the same on his notes.

We cannot say that under these circumstances the plaintiff, a layman, should have known that by consulting the court files in the Grosse case he would have learned any more than he had learned from the fact that the property he was purchasing or had purchased from McGuire was claimed as the property of Feldman on a writ of attachment against him.

4. The court did not err in receiving in evidence the bill of sale from Feldman to McGuire.

5. Defendant assigns as error the refusal to give his first request to instruct the jury, which charges, in substance, that plaintiff is not an innocent purchaser unless he purchased without notice of any intention to defraud on the part of the vendor, and paid a valuable consideration for the property before he had notice of such fraud. This request is misleading, and was properly refused, because it leaves out of consideration the fact that McGuire might have been an innocent purchaser for value without any such notice, and, if so, plaintiff, whether he had notice or not, could have purchased McGuire's rights. Whether or not the giving of plaintiff's notes to McGuire

was a sufficient consideration or payment of the purchase price to protect plaintiff against subsequent notice of fraud received by him before he paid the notes is a question which appellant now attempts to raise on another portion of this request. But, if the request is bad in part, we will not consider the rest of it.

The second and third requests were fully, completely, and effectively covered by the general charge. The fourth request is erroneous in assuming that plaintiff does not claim that McGuire had title to the property when plaintiff purchased from him.

This disposes of all the questions raised worthy of consideration, and the order appealed from is affirmed.

MICHAEL A. BRATTLAND v. W. W. CALKINS.[1]

67 119
82 334
82 335

January 4, 1897.

Nos. 10,453—(300).

Election Precinct—G. S. 1894, §§ 10, 11.

An attempt to establish, under G. S. 1894, §§ 10, 11, an election precinct out of portions of two counties is an absolute nullity; and the residents of the territory included in such alleged precinct have no more right to vote than if such precinct had never been established.

Same—Petition—Publication.

Section 10 requires the voters to petition the governor, at least eight weeks before election, to establish the precinct, and section 11 is construed to require the list of precincts established to be published at least six weeks before election. *Held*, these provisions are mandatory, and, when the petition was presented not more than five weeks and five days before election, and the list of precincts established was not published earlier than the day before election, the precinct was not established at all for the purposes of such election.

Same—Indian Reservation—Unorganized Townships.

Whether the state authorities have power to organize, for election purposes, the White Earth Indian reservation, quære. Whether the governor, under sections 10 and 11, or the board of county commissioners, un-

[1] Reported in 69 N. W. 699.

der G. S. 1894, § 692, should organize election precincts in territory having no township organization, in a county organized to the extent that Norman county is, quære.

Appeal by W. W. Calkins from a judgment of the district court for Norman county declaring M. A. Brattland to be duly elected judge of probate of that county, entered in pursuance of the findings and order of Ives, J. Affirmed.

H. Steenerson, *Ira B. Mills*, and *W. W. Calkins*, for appellant.

The precinct having been established by the proper authority, the claimant having allowed the election to be held without protest, and having awaited the result of the election, and endeavored to secure its benefits to himself, he ought not to be allowed to repudiate the results on the ground of defects in the proceedings establishing the precinct. State v. Langlie, 5 N. D. 594, 67 N. W. 958; Currie v. Paulson, 43 Minn. 411, 45 N. W. 854. The unorganized and partially organized counties mentioned in G. S. 1894, § 10, have reference to counties unorganized or partially organized for election purposes. Under G. S. 1894, §§ 657, 692, the county commissioners in any county, unorganized or organized, have authority to establish election districts in territory not organized into townships. Thus the jurisdiction of the county commissioners, if they have any, is concurrent with that of the governor.

It does not appear that any nonresident of Norman county voted, and the claimant would not be injured unless he can show that such voters actually cast their votes in this precinct. The error is a mere irregularity by which the claimant has not been injured. Peard v. State, 34 Neb. 372, 51 N. W. 828; State v. Horan, 85 Wis. 94, 55 N. W. 157; State v. Leavitt, 33 Neb. 285, 49 N. W. 1097.

The publication was not material unless it appears further that the claimant was prejudiced. The publication was within the literal wording of the statute. The notice was published "within" at least six weeks before the day of election. See Peard v. State, supra; State v. Horan, supra; State v. Leavitt, supra; State v. Thayer, 31 Neb. 82, 47 N. W. 704; Adsit v. Secretary of State, 84 Mich. 420, 48 N. W. 31; People v. Village of Highland Park, 88 Mich. 653, 50 N. W. 660.

There are persons on an Indian reservation not tribal Indians who have a right to vote. See Act of Congress, Feb. 8, 1887; State v. Norris, 37 Neb. 299, 55 N. W. 1086. The state of Minnesota has jurisdiction over its territory unless restricted by the act authorizing the admission of the state into the Union or by some treaty of the United States with the Indians. There is no such limitation. State v. Campbell, 53 Minn. 354, 55 N. W. 553; Const. art. 15, § 2; State v. Norris, supra. Foster v. Board of Commrs., 7 Minn. 84 (140), was decided prior to the adoption of the constitution, and is in effect overruled by Truscott v. Hurlbut L. & C. Co., 73 Fed. 60, 19 C. C. A. 374. Earl v. Godley, 42 Minn. 361, 44 N. W. 254, is not in point.

M. A. Brattland, for respondent.

If the governor's action is conclusive then no official act of his which is illegal can be impeached. By G. S. 1894, §§ 10, 11, the governor's power to establish new election districts is expressly limited to unorganized and partially organized counties. These words have a positive and well-known legal meaning. By G. S. 1894, § 692, county commissioners have power to establish election districts in unorganized territory within organized counties. These provisions are not contradictory nor inconsistent. The general repeal clause in the election act of 1893 does not affect organized counties or the power of county commissioners in such counties. For the construction of G. S. 1894, § 657, see State v. Parker, 25 Minn. 215; Smith v. Anderson, 33 Minn. 25, 21 N. W. 841.

Norman county was organized pursuant to Laws 1881, c. 92, and its creation was proclaimed by the governor Nov. 28, 1881. The east boundary line of Norman county was established by the act defining the west line of Beltrami county. G. S. 1894, § 542. At that time Norman was a part of Polk county. An election district cannot be established so as to include parts of different counties. See G. S. 1894, §§ 10, 692.

The petition for the establishment of an election district in an unorganized county shall be made to the governor "at least eight weeks before any general election." By G. S. 1894, § 11, "the governor shall, within at least six weeks before a general election," publish a list of election districts established by him. When a thing required to be done is shown to have been done in a certain way,

there is no presumption that it is also done in some other way. Barber v. Morris, 37 Minn. 194, and cases cited on page 196; 33 N. W. 559, and cases cited on page 561. Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163.

By treaty with the Mississippi band of Chippewa Indians, March 19, 1867, the government reserved the White Earth Indian reservation out of all the pre-existing Indian country within Minnesota, for the exclusive benefit and use of the Indians. It was exempted from taxation and could not be sold. Revision of Indian Treaties, 272; 16 U. S. St. at Large, 719. This is substantially the present status of this reservation. The Indian country was defined by act of congress, June 30, 1834 (4 U. S. St. at Large, 729). The subsequent adoption of a state constitution did not affect the legally reserved Indian country and reservations. The authorities cited by appellant are cases where perfected allotments have been made to the Indians and they have abandoned tribal relations. The intention of the Federal government with respect to the White Earth reservation is still undecided. Minnesota cases declare the state has no civil jurisdiction over legally reserved Indian reservations. United States v. Shanks, 15 Minn. 302 (369). As to Indian country, see Forty-Three Cases Cognac Brandy, 14 Fed. 539; United States v. Martin, 14 Fed. 817.

CANTY, J. This is an appeal from the judgment of the court below deciding an election contest over the office of judge of probate of Norman county, which contest was conducted under G. S. 1894, §§ 186, 190, 191, 194. On the face of the returns of the general election held November 3, 1896, the appellant, Calkins, received 1,387 votes, as against 1,364 for the respondent, Brattland, or a majority of 23, and was declared elected. Thereupon Brattland served a notice of contest, and the matter came on for trial before the district court. The vote of the precinct of Beaulieu was on such trial thrown out. Calkins received 70 votes in this precinct and Brattland 28. This left 1,317 votes for Calkins and 1,336 for Brattland, and the latter was by the court declared elected by a majority of 19.

The question presented on this appeal is whether or not the residents of the territory covered by the alleged voting precinct of Beaulieu were entitled to vote for probate judge at the election in question. The portion of Norman county included in this alleged precinct

is a part of the White Earth Indian reservation, and, of course, there are no organized townships in the same, which, under G. S. 1894, § 8, would constitute election districts. Claiming to act under G. S. 1894, §§ 10, 11, the governor, on October 10, 1896, made an order purporting to establish a new election district, "in Norman county," out of townships Nos. 144, 145, and 146, in ranges 38, 39, 40, 41, and 42. Of these 15 congressional townships, 12 are in Norman county and 3 (also in the reservation) are in the unorganized county of Beltrami; the line between the two counties being the line between ranges 38 and 39. The governor had no authority, under the law, to establish an election precinct out of a portion of each of two counties, and we are of the opinion that the attempted establishment was absolutely void.

Appellant contends that, as the order describes the territory included in the precinct as being in Norman county, it is evident that the three townships in range 38 were included by mistake. In answer we will say that we cannot construe the description in this order as we would the description in a voluntary deed, which is construed most strongly against the grantor and in favor of the grantee. We cannot, for the purpose of giving effect to this order, reject as surplusage the three towns outside of Norman county. To attempt to uphold in this way such an extremely inaccurate public transaction would result in great confusion for all future time. Such gross error in the establishment of political divisions that are to endure perhaps for many years would be a fruitful source of mistake on the part of voters and local officers at every election, and cannot be tolerated.

Appellant cites Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95, as authority for his position that, when the vote is cast and counted, an irregularity as to the territorial limits of a voting precinct is not a sufficient cause for throwing out the vote of that precinct. That case grew out of the mistake of supposing that a village was a separate voting precinct from the rest of the township. The voters of the village voted at a different polling place from those of the rest of the township. In that case the voters were entitled to vote somewhere for all officers for whom any votes were cast. In this case, the voters were not entitled to vote at all until the territory was organized for voting purposes, which had, in fact, never been done, and,

besides, the residents of the three townships in Beltrami county would in no event have a right to vote for probate judge of Norman county.

It does not appear whether or not any residents of these three towns voted in this precinct at this election, and appellant contends that the burden was on the contestant to show that they did so vote before he is entitled to have the votes of the precinct thrown out. Appellant mistakes the radical character of the irregularity in question. It is not a temporary or casual irregularity, which may not occur again, but it is one which must necessarily continue to occur at every election, and be a source of perpetual strife, as long as the precinct remains. Public policy will not tolerate the recognition of such a precinct at all, and we must hold that the attempted organization of it is an absolute nullity.

2. Another ground of contest presented by respondent is that all of the proceedings for the establishment of this precinct were had too late to comply with the law. Section 10, G. S. 1894, provides:

"Whenever any number of voters, not less than eight, residing in an unorganized or partly organized county, shall, at least eight weeks before any general and six weeks before any special election, petition the governor to establish a new election district, designating the boundaries of the same," etc., he is authorized to establish such district.

Section 11 provides:

"The governor shall, within at least six weeks before a general election and within four weeks before a special election, publish in one newspaper published at the state capital a list of all election districts by him established in unorganized counties, together with the places where the elections are to be held, and the names of the judges of election by him appointed."

While section 11 uses the words "within at least six weeks," it seems to us clear that the legislature meant that the list of precincts established should be published at least six weeks before election, and not during the six weeks, especially as section 10 requires the petition to be presented at least eight weeks before election.

The petition for the establishment of this precinct is dated September 24, 1896, or two weeks and two days too late to give the eight weeks before election required by the statute. The list was published once in the St. Paul Dispatch on November 2, the day before election, while the statute requires that it shall be published at least

six weeks before election. We must hold these statutory provisions mandatory, and not directory, in view of the necessity of notice to the voters of the changed conditions which give them an opportunity to vote, and the necessity of preparing poll lists 20 days before election, and posting the same 10 days before election, together with notice of the time and place of the meeting of the board to correct the lists, as required by G. S. 1894, § 60. Then, even if this voting precinct was in other respects regular, it must be considered as organized too late, or not organized at all, for the purpose of the election in question, and the vote cast in that precinct at that election should not be counted.

There is nothing in appellant's position that, although these irregular proceedings appear, it should still be presumed that the precinct was regularly established by other and different proceedings. No such presumption exists. Barber v. Morris, 37 Minn. 194, 33 N. W. 559; Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163.

3. Whether or not the state authorities have power to organize, for election purposes, the territory included within the White Earth Indian reservation, is a question which it is unnecessary to decide on this appeal, and we decline to consider that question at this time. Neither is it necessary to consider the question whether the governor, under sections 10 and 11, or the board of county commissioners, under section 692 of the General Statutes of 1894, is the proper authority to organize election precincts in territory having no township organization, in a county organized to the extent that Norman county is, or whether the power conferred on each authority is in such a case concurrent.

Judgment affirmed.

EPHRAIM B. PLACE and Another v. ST. PAUL TITLE INSURANCE & TRUST COMPANY.[1]

January 7, 1897.

Nos. 10,160—(161).

Title Insurance Policy—"Tenancy of Present Occupants."

Held, that the phrase, "Tenancy of the present occupants," stated in a title insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued.

Right of Action—Condition.

Held, further, that a condition precedent to a right of action upon the policy, which prohibited a recovery unless the insured had contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy, has no application to a case where the land is held by another party in actual adverse possession, and the insured has lost it absolutely by reason of a defect in the insured title.

Appeal by defendant from an order of the district court for Ramsey county, Brill, J., overruling a demurrer to the complaint. Affirmed.

The complaint alleged the issue to plaintiffs of defendant's insurance policy to indemnify them as mortgagees of a certain tract of land in block 15 of Robert & Randall's addition to St. Paul by reason of defects in the title of the mortgagors to said tract. That in 1894 plaintiffs foreclosed their mortgage, and bid off the property for the amount due upon said mortgage, including taxes paid by plaintiffs and the expenses of sale. That at the date of said mortgage neither of the mortgagors had any right, title, or interest in a certain strip off one side of said tract. That plaintiffs had no notice of said defect until the year 1895. That in 1896 plaintiffs gave defendant due notice in writing of said defect in said title and of their

[1] Reported in 69 N. W. 706.

claims for damages. That plaintiffs have in all things complied with all the things provided in said policy to be done or performed by them. That the value of the strip of land so lost to them is $1,200.

Stevens, O'Brien, Cole & Albrecht, for appellant.

Tenancy is a holding, or mode of holding, an estate. Burrill, Law Dict. Tenant is used in American law. 3 Kent, Com. 488, 513, 514. Applied to an estate in fee simple it signifies owner or proprietor; as applied to less estates, it signifies holder, occupier, or possessor. Bouvier defines "tenancy" as the estate held by a tenant. He defines "tenant" as one who holds land by any kind of title, whether for years, for life, or in fee. See Harris v. Reynolds, 13 Cal. 515.

The occurrence of matters mentioned in the policy as conditions precedent not being alleged, there can be no recovery. See Stees v. Leonard, 20 Minn. 448 (494); Dermott v. Jones, 2 Wall. 1; Anderson v. May, 50 Minn. 280, 52 N. W. 530; The Harriman, 9 Wall. 161; Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342; Sergent v. London & L. & G. I. Co., 85 Hun, 31, 32 N. Y. Supp. 594; Gies v. Bechtner, 12 Minn. 183 (279); Bowlin v. Hekla F. I. Co., 36 Minn. 433, 31 N. W. 859; Gasser v. Sun F. O., 42 Minn. 315, 44 N. W. 252; Mosness v. German A. I. Co., 50 Minn. 341, 52 N. W. 932; Shapiro v. Western H. I. Co., 51 Minn. 239, 53 N. W. 463.

Gilfillan, Willard & Willard, for respondents.

In what sense did defendant intend its customers to understand the word "tenancy" in its policy? The persons who would make use of title insurance would not ordinarily be lawyers. They would be people who would understand words in their popular sense. The phrase was clearly intended to save the company from liability if by reason of leases the insured was not entitled to immediate possession. In cases of doubt the language of the policy must be construed against the company. Minneapolis T. Mnfg. Co. v. Fireman's Ins. Co., 57 Minn. 35, 58 N. W. 819; Anoka L. Co. v. Fidelity & C. Co., 63 Minn. 286, 65 N. W. 353.

The company's purpose in inserting the condition quoted in the opinion is plain. It adopted the law relating to covenants in a deed, that actual loss must precede compensation. Ogden v. Ball, 38 Minn. 237, 36 N. W. 344. That rule was never intended to apply to a case

where the complaint shows that the insured has in fact lost the land in consequence of a defect in title.

The law does not compel a man to do an impossible thing. A thing is impossible in a legal sense when it cannot be accomplished without fraud. The plaintiffs cannot sell this land without making false representations about it. They do not own it. They know they do not own it. They are not in possession of it. They must either commit a fraud upon a proposed purchaser or else arrange a fictitious suit with him and commit a fraud on the court.

COLLINS, J. Two questions only are presented by this appeal, both dependent upon the construction to be placed upon language used in a title insurance policy issued by defendant company to plaintiffs as mortgagees of certain real property. The contract, as stated in the policy, was, among other things, to indemnify, keep harmless, and insure plaintiffs from all loss or damage, not to exceed a stated sum of money, sustained by reason of defects in the title of the mortgagors in the mortgaged estate, excepting such as were set forth in an attached schedule, and subject, also, to the stipulations and conditions made a part of the policy. In the schedule an item, stated as "Tenancy of the present occupants," was mentioned as a defect in or objection to the title against which the company did not insure; and among the stipulations and conditions of the policy was one that:

"No right of action shall accrue under this policy unless the insured, or those claiming under him as aforesaid, shall have been actually evicted under an adverse title not mentioned or referred to in the above Schedule B, or unless there has been a final judgment upon a lien or incumbrance not mentioned or referred to in said Schedule B, under which the title of the insured will be divested by sale under judgment or foreclosure, or unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or incumbered by reason of a defect or incumbrance for which the company would be liable under this policy."

From the complaint it appeared that, at a foreclosure sale of the mortgaged premises, the plaintiffs purchased the same for the full amount due on the debt; that no redemption had been made within the statutory period; that, at the date the mortgage was delivered, and when the policy was issued, the mortgagors were not the own-

ers, in fee or otherwise, of a portion of the mortgaged premises, nor were they in possession, but, to the contrary, said portion was then, and ever since has been, owned and in the actual adverse possession and occupancy of other persons; and that, prior to the issuance of the policy, the mortgagors had been evicted therefrom.

1. It is the position of defendant's counsel that, from the allegations of this complaint, it appears that the case in hand was expressly excepted from the policy because of the words in the schedule, "Tenancy of the present occupants."

If we are to give these words their broadest signification, and construe them without regard to the object or purpose of the contract, or the language used elsewhere, the position would be quite easily sustained; for the broad definition of a "tenant" is one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. The persons mentioned in the complaint as having been, and as still continuing, in adverse possession, are certainly tenants, within this comprehensive definition.

But, when we read the entire policy, and consider its object and alleged purpose,—that it purported to be a contract to indemnify plaintiffs, as mortgagees, against loss or damage sustained by reason of defects in the mortgagors' title; that, if the construction contended for by counsel for the defendant should prevail, it would apply in cases where the entire premises were in the adverse possession of another, as well as those, like the present, where only a part is held adversely, leaving the policy holder remediless when he has actually bought and paid for protection; that, if the design of the defendant was to exclude from its policy all liability as to the title "of the present occupants," it could have said so by simply changing one word of the phrase, "tenancy of the present occupants," which, at most, is ambiguous only; that, where an expression in an insurance policy is of such a character, the ambiguity is to be construed against the insurer, and in favor of the insured; that the word "tenant" is generally used in a popular sense, and, as mentioned in this sense, according to Webster, "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord"; and also that, without a provision of this import, the insurer would probably incur a liability if there were outstand-

ing leases, and the insured could not obtain possession at any moment,—we are decidedly of the opinion that the tenancy mentioned in the schedule was that which has arisen through the occupation or temporary possession of part or all of the premises by those who were tenants, in the popular sense in which that word is used. See Caplis v. American F. I. Co., 60 Minn. 376, 62 N. W. 440.

2. As the complaint fails to allege the occurrence of any of the conditions precedent, hereinbefore quoted, as found in the policy, counsel for appellant urge this as another reason why the general demurrer should have been sustained.

A final judgment upon a lien or incumbrance certainly has no reference to a case like this. And counsel practically concede that the condition requiring actual eviction under adverse title has no application, for the defect upon which plaintiffs base their cause of action is inability to obtain possession, and entire want of title, and nothing else. It is really admitted by counsel that, if any of these conditions precedent stand in the way of a recovery upon the present complaint, it must be that which prohibits recovery unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy.

If this condition was intended to apply to a case of this character, it demands of plaintiffs that, with full knowledge of a total want of title to a part of the premises, they find some one upon whom they can impose by entering into a contract to sell that which they do not own, or that they enter into a sham contract of sale, have the vendee refuse to perform, bring a suit against him, and then go through the form of an action which is fictitious from start to finish, and a fraud upon the court in which it is prosecuted. They are either compelled to perpetrate a fraud upon the innocent vendee, or a fraud upon the court in which they bring the action. We cannot believe that the defendant company ever intended the condition in question to cover a case like this, but, rather, that it was designed to guard against actions for nominal damages, instituted by persons who had ascertained that defects existed in their titles, but whose possession remained undisturbed, and who had suffered no loss. It was an adaptation of the law relating to covenants in a deed, that actual loss must

precede actual compensation, to the title insurance business. None of the conditions found in the quoted language apply to a case where not only does another party hold possession of the land adversely to the insured, but the latter has lost it absolutely by reason of a defect in the insured title.

Order affirmed.

NORTHERN TRUST COMPANY v. CRYSTAL LAKE CEMETERY ASSOCIATION and Others.

LOUIS F. MENAGE v. SAME.[1]

January 7, 1897.

Nos. 10,239, 10,240—(155, 294).

Judgment by Default—Vacating.

Held, upon the facts appearing on the hearing of a motion made by the defendant to set aside and vacate a default judgment entered in an action brought to foreclose a real-estate mortgage and for leave to answer, that the court below did not err when it denied the motion.

Same—Estoppel by Judgment.

A judgment by default is attended with the same legal consequences, when considering the rules governing estoppel by judgment, as if there had been a verdict for plaintiff.

Judgment of Foreclosure—Res Judicata.

In an action to foreclose a mortgage, the court having jurisdiction over the subject-matter and over the parties, its judgment of foreclosure necessarily involves, as a condition precedent to the right to foreclose, the validity of the mortgage. The adjudication is final between the parties, and a bar by estoppel to further controversy between them upon that question.

Actions in the district court for Hennepin county. In the first case defendant cemetery association appealed from an order, Russell, J., denying a motion for a new trial. In the second case defendant cemetery association appealed from an order, Jamison, J., denying a motion to set aside the judgment and for leave to answer. Orders affirmed.

[1] Reported in 69 N. W. 708.

Wilkinson & Traxler, for appellant.
Bartleson & Paul and *Cross, Carleton & Cross*, for respondents.

COLLINS, J. These cases, growing out of the same transaction, were argued and submitted together. A statement of the facts seems necessary.

The cemetery association, defendant in each case, mortgaged certain real property to one Norton after it had platted the same into lots, had dedicated the premises as a place for the burial of the dead, had duly executed and acknowledged the plat, had filed the same for record, and such plat had been duly recorded. Menage, plaintiff in one of these actions, became the owner of the mortgage and the debt secured thereby, by assignment, and in May, 1890, commenced an action to foreclose the mortgage. The summons was duly and personally served upon the proper officers of the defendant association. Upon proof of such service, and that no appearance had been made, and no answer filed by or in behalf of the defendant, the court, after the expiration of the time within which answer should have been made, ordered that judgment of foreclosure of the mortgage and sale of the mortgaged premises be entered. On May 31, 1890, such a judgment was entered in due form by the clerk of the court, and upon a certified copy of such judgment the sheriff of the county proceeded to sell the premises, as by law authorized and required. The sale was made to Menage, and the sheriff made due report to the court. This report was duly confirmed by the court, and on November 12, 1892, the year of redemption having expired without a redemption, the court made its final decree in due form, in which it determined and adjudged that, as against the defendant association, the title to the mortgaged premises was vested in said Menage.

The trust company, plaintiff in one of these actions, is the assignee in insolvency of Menage, and in July, 1895, commenced an action in ejectment against the association to recover possession of the land described in the mortgage, judgment of foreclosure, and final decree. This is the action now before us, in which the trust company is plaintiff. Such proceedings were afterwards had in the action as resulted in findings of fact in plaintiff's favor with an order for judgment for possession of the land, and defendant's appeal is from an order denying a new trial.

Meantime the defendant association moved the court to set aside and to declare void the judgment in the foreclosure proceedings, and also the final decree therein, and also to vacate and set aside all proceedings had in the action to foreclose, and that it be allowed to appear and defend in the action. This motion was made on the files in the action, a petition, certain affidavits, and a proposed answer. The motion was denied, and defendant appealed.

This appeal is first in order of disposal.

The only reasons urged by the defendant why there was not inexcusable neglect and delay in making this motion are that when the action was brought the officers of the association consulted reputable attorneys as to a defense, and were advised and believed that it had no defense to the foreclosure proceedings. And also that when the case of Wolford v. Crystal Lake C. Assn., 54 Minn. 440, 56 N. W. 56, was decided, in which it was held that lands acquired by a cemetery corporation, duly platted for cemetery purposes, the plat being recorded, and the platted land used to some extent as a place for the burial of the dead, cannot be conveyed by such corporation except for the exclusive purposes of burial, and cannot be mortgaged, the association was justified in believing, and did believe, until the trust company brought its action, that it had abandoned all claim to the property under or by virtue of the mortgage or the foreclosure proceedings.

If it were possible, under any circumstances, for these reasons to be sufficient to excuse the defendant, and to warrant the court in opening the judgment so as to permit the interposition of an answer, the facts in this case would prevent the granting of the motion; for, although it is not made to appear affirmatively that the officers of the association knew of the entry of judgment in the action to foreclose at or about the day it was entered, May 31, 1890, they neglect to assert in their moving papers that they did not then know of it, and it is fair to presume that they did; and in reference to the advice of counsel, on which reliance was placed, it clearly appears from the moving papers that within a few days subsequent to the commencement of the Wolford action, which was early in February, 1892, these officers were advised by other counsel that any action based upon a mortgage given by a cemetery association upon land platted for burial purposes, dedicated and used as a place for the burial of

the dead, could be successfully defended, because such an association had no power to mortgage such real estate. This advice was given and received some months prior to the rendition of the final decree in November, 1892. Further than this, the judgment in the Wolford case, in which the law applicable thereto, as well as to the Norton mortgage, had its validity been questioned in the foreclosure action, was finally determined, was entered August 21, 1893. The defendant association, although knowing of the foreclosure judgment and of the subsequent steps, as we can presume, did not make this motion until early in September, 1895, more than three years after the case on which it now relies was decided. Nor is it an extenuating circumstance that the trust company took no steps towards enforcing the judgment and the later proceedings in the Menage case, until it brought ejectment in July, 1895. Menage or his assignee were under no obligation promptly to assert a claim for possession of the property. Upon the other hand, it was the defendant's duty promptly to make its attempt to relieve itself of the consequences of its default in the foreclosure action, when it discovered that there was a probability of making a successful defense to the mortgage. Obviously, the defendant made no case for relief under the provisions of G. S. 1894, § 5267. Nor is this claimed by its counsel. We quite agree with the remark in the order of the court below that the defendant "has been guilty of negligence in not making said motion long before this time, and is guilty of inexcusable laches." The order denying the motion in the Menage case must be affirmed.

And the order denying a new trial in the action of ejectment must also be affirmed, unless we are to disregard and overturn all rules of law respecting the conclusiveness of judgments of courts of record. It is to be observed that there is no intimation here that the judgment was secured through any fraud on the part of Menage, or connivance on the part of those who represented the defendant, and should have protected its interests. To be sure, it was a default judgment, but, when considering the rules governing estoppel by judgment, a judgment by default is attended with the same legal consequences as if there had been a verdict for plaintiff. There exists no solid distinction between a title confessed and one tried and determined. Freeman, Judgm. § 330, and cases cited. And the judgment in the foreclosure action determined every matter which pertained to

the cause of action set out in the complaint and involved in the measure of relief to which the cause of action entitled the plaintiff, even though such matter may not have been set forth in such complaint so as to admit proof, and call for an actual decision upon it. Thompson v. Myrick, 24 Minn. 4. See, also, Bazille v. Murray, 40 Minn. 48, 41 N. W. 238.

And it has already been held in this court that under the issues tendered by a bill of complaint in an action to foreclose a mortgage upon real property the validity of the note and of the mortgage being foreclosed and the amount due thereon are necessarily involved and adjudged by the judgment therein rendered; and that, the jurisdiction of the court being undoubted, both as respects the subject-matter and the parties, it follows that its judgment, when properly pleaded, is a conclusive bar to any further litigation of the same matter arising between the same parties in any other action. Allis v. Davidson, 23 Minn. 442.

In the foreclosure action the court had jurisdiction over the subject-matter and over the parties, and its judgment necessarily involved, as a condition precedent to the right to foreclose, the validity of the mortgage given by the association. Once adjudicated, that adjudication is final, and a bar by estoppel to further controversy between the same parties upon the same questions. This case is not a peculiar and exceptional one, in which the well-settled rules relating to estoppel by judgment are inapplicable, as counsel contend, but is within these rules, and must be governed by them.

Counsel have also in their brief and in the oral argument referred to and relied upon Wolford v. Crystal Lake C. Assn., supra, as authority for the proposition that, as defendant was without power to execute the mortgage, the doctrine of estoppel has no application here, and the judgment does not bar it from setting up the want of power in an action to eject. But it must be borne in mind that the only estoppel suggested or involved in that action was one in pais. The mortgage then under consideration covered a part of this same cemetery, and an attempt had been made to ratify its execution by the adoption of a resolution by the association, while the foreclosure was by advertisement under the statute, and not by judicial proceedings. The language used there must be read with reference to the subject and facts under discussion, and noth-

ing was said which would indicate that the expressions were intended to cover the doctrine of estoppel by judgment.

Counsel have also referred to the fact that a number of lots have been sold since the Wolford case was decided, and the bodies of deceased persons have been buried upon this tract of ground. The rights of lot owners, under these circumstances, are not now before us for consideration.

Both orders stand affirmed.

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J. R. WATKINS v. C. O. LANDON and Others.[1]

January 7, 1897.

Nos. 10,301—(186).

Judgment—Action to Set Aside—Perjury—Due Diligence.

The construction of G. S. 1894, § 5434, given in Hass v. Billings, 42 Minn. 63, followed, and applied to the allegations of the complaint herein.

Appeal by plaintiff from a judgment of the district court for Wabasha county in favor of defendants, entered in pursuance of the order of Gould, J. Affirmed.

The facts upon which the first action were based are stated in Watkins v. Landon, 52 Minn. 389, 54 N. W. 193. Judgment in that case was entered as stated in the following opinion. The present action was begun in August, 1895, and at the trial was dismissed as stated in the opinion. Defendants' motion to dismiss was made on the grounds (1) that the complaint did not state a cause of action, and (2) that it appeared from the facts admitted in the pleadings that the fraud and subornation of perjury were discovered more than three years before the action was begun.

W. T. Valentine and *Erwin & Shumaker*, for appellant.

Since the time within which plaintiff has to commence an action begins to run on the discovery of the fraud or perjury, such discovery is of such evidence as would make a prima facie case. Shannon v. White, 6 Rich. Eq. 96; Way v. Cutting, 20 N. H. 187;

[1] Reported in 69 N. W. 711.

Kansas Pac. R. Co. v. McCormick, 20 Kan. 107; Marbourg v. McCormick, 23 Kan. 38. The question is, when did plaintiff discover the fraud? See Piatt v. Longworth, 27 Oh. St. 159. The burden of proving notice is upon the party alleging it. Harlin v. Stevenson, 30 Iowa, 371; Sears v. Shafer, 6 N. Y. 268; Long v. Mulford, 17 Oh. St. 484. For ignorance cannot be proven. Hopkins v. Mazyck, Hill Ch. 242.

The Minnesota statute was an innovation on the common law, and extended the ground upon which an action might be brought. See Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341. It could not have been the intention of the court in Hass v. Billings, 42 Minn. 63, 43 N. W. 797, to hold that in no case would an action lie under the statute against a judgment obtained by perjured testimony upon an issue made by the pleadings, for, if a judgment may not be set aside for perjury and subornation of perjury upon an issue made at the trial, then those words in the statute are meaningless. At common law where a judgment was permeated with perjury and the perjury consisted in the introduction of forged documents, equity would give relief. Gray v. Barton, 62 Mich. 186, 28 N. W. 815; Towey v. Young, Prec. Ch. 193.

Webber & Lees, for respondents.

The legislature did not intend that the statute should confer upon the defeated party the right to seek relief from a judgment against him upon the same grounds which he had urged as a reason for obtaining relief. Otherwise it would result that a defeated litigant could thus twice obtain the adjudication of a court upon the same question on the same grounds. Any such construction of the statute would seem unreasonable. The purpose of the statute is evident from cases in other jurisdictions. Smith v. Lowry, 1 John. Ch. 320; Greene v. Greene, 2 Gray, 361; United States v. Throckmorton, 98 U. S. 61; Vance v. Burbank, 101 U. S. 514; Hilton v. Guyott, 42 Fed. 249; Gray v. Barton, 62 Mich. 186, 28 N. W. 813; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537.

COLLINS, J.[2] In an action pending in district court between these same parties judgment was ordered upon findings of fact in

[2] The CHIEF JUSTICE took no part.

favor of these defendants, and thereafter plaintiff's motion for a new trial was denied. On appeal to this court the order denying the motion was affirmed. 52 Minn. 389, 54 N. W. 193. Subsequently, December 1, 1893, judgment was entered in conformity with the findings against this plaintiff. The present action, based upon the provisions of G. S. 1894, § 5434, was brought to set aside this judgment, upon the ground that it was obtained by the fraud of and the subornation of perjury by the defendants. At the trial of this action, but before any testimony had been produced, the court dismissed the same, ordering judgment upon the merits in favor of the defendants. This appeal is from the judgment of dismissal thereafter rendered.

Since its enactment in 1877 the section in question has been before this court for interpretation and application a number of times. In Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89, it was said that, as it is in derogation of the well-established and salutary principle of the common law which forbids the retrial of an issue once determined by a final judgment, it must not be construed so as to extend its operation beyond its most obvious import. In Hass v. Billings, 42 Minn. 63, 43 N. W. 797, the scope and purpose of the statute were considered more at length, and it was then said that no general rule could be laid down by which to determine what cases came within it; that it was safer to determine from time to time, as each case may arise, whether the circumstances bring it within what the court might deem to be its spirit and intent. But, said the court:

"When an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is under any necessity, to depend on the other proving the fact to be as he himself claims it, * * * the mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses will not * * * bring his case within the meaning of the statute."

It could not have been intended to excuse a party from exercising proper diligence in preparing for trial; nor was the statute intended, in giving the action, to make unnecessary the ordinary prudence and reasonable diligence required in cases of applications for new trials on the ground of surprise or newly-discovered evidence. This construction of the statute has been followed and

the rule there laid down expressly approved in Wilkins v. Sherwood, 55 Minn. 154, 56 N. W. 591, and Colby v. Colby, 59 Minn. 432, 61 N. W. 460. It must be regarded as the settled law in respect to the statute it construes.

The only question, then, is, does it apply to the case now before us? The gist of the complaint in the present action in respect to the fraud and perjury is that, prior to the trial of the former action, these defendants wrongfully and fraudulently procured and induced one Sands to forge a certain assignment purporting to be signed by Dr. Ward, the inventor of the liniment over which the litigation arose, and purporting to convey the right to Sands to make and sell the liniment in Minnesota, and at the trial the defendants wrongfully and fraudulently produced and introduced this forged assignment in evidence, and, further, did procure and induce Sands then and there to testify falsely that said assignment was actually made, executed, and delivered by Dr. Ward to him (Sands) at Pennsylvaniaburg, in the state of Indiana, on July 16, 1856.

We find that, attached to the complaint herein, and made a part thereof, are copies of the complaint, answer, reply, findings of fact, conclusions of law, and judgment in the former action; said judgment being the one assailed in this proceeding as having been obtained by the alleged fraud, perjury, and subornation of perjury at the trial. In the answer just mentioned the defendants distinctly alleged that, at Pennsylvaniaburg, in the state of Indiana, on the 16th day of July, 1856, said Ward duly assigned, transferred, and granted to said Sands, in consideration of the sum of $5, the right to manufacture and sell the liniment in question in Minnesota, and did then and there deliver to Sands the formula or recipe for making the same. These allegations were put squarely in issue by the reply. The court, in its findings, found in favor of the defendants and against the plaintiff upon the issue thus made; its finding being substantially in the language of the answer.

It would be difficult to prepare an answer and reply in which the issue as to an alleged assignment of a right to manufacture and sell an article, affirmed on the one side and denied upon the other, could be more fairly and distinctly presented, even as to places and dates, than it was in the answer and reply referred to and

made a part of the complaint herein. The plaintiff was advised in the most unequivocal way, by the allegation in the answer, that at the trial the defendants would attempt to prove that, at a specified place in the state of Indiana, upon a certain day in the year 1856, Dr. Ward did execute and deliver to Sands an assignment of the import stated, and did then and there in a formal manner authorize his assignee to manufacture and sell the liniment in Minnesota, and at the same time and place did furnish to him the formula and recipe for making the article. In his reply the plaintiff denied the assignment, and averred that no such assignment was made.

It was his duty to prepare for a trial of the issue, and to exercise proper diligence to meet the defendants' allegations in respect to the assignment. Of course, it is not a case where plaintiff would have the right, nor was he under any necessity, to depend upon the defendants for proof that the fact was as he claimed in respect to the assignment. It was said, in Clark v. Lee, 58 Minn. 410, 59 N. W. 970, that a party against whom a judgment has been obtained cannot, by commencing an action under the statute in question, obtain relief or make a defense which he should have made in the original action, when there is no excuse for his having failed to make it.

The complaint in the present action does not advise us whether the plaintiff actually made a defense to the claim of assignment, or wholly failed so to do upon the trial. But, in principle, there can be no distinction made between a case in which a defense is actually made, but proves unsuccessful, and one in which there is a total failure to defend. The complaint herein upon its face brings the case within the rule laid down in Hass v. Billings, supra, and, as no cause of action was therein stated, the action was properly dismissed.

Judgment affirmed.

JOHN G. JOHNSON v. MINNEAPOLIS GENERAL ELECTRIC COMPANY.[1] | 67 141 | 70 480 |

January 7, 1897.

Nos. 10,306—(159).

Master and Servant—Vice Principal—Contributory Negligence.

In an action brought to recover for personal injuries received by plaintiff while in defendant's employ, it is *held* that, on the evidence introduced by plaintiff, it was for the jury to determine whether another employé, the superintendent of defendant's plant, was a vice principal at the time of the accident, and whether such accident resulted from the negligence of such employé.

Appeal by defendant from an order of the district court for Hennepin county, Smith, J., granting a motion for a new trial. Affirmed.

Flannery & Cooke, for appellant.

The testimony shows beyond dispute that the blocking of the boiler on the wagon, the removal of the skids, and the unfastening of the rope were but details of the work, and it is immaterial whether Mr. Wright or some one else directed these things to be done. It was but the direction of one fellow servant to another. Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; Marsh v. Herman, 47 Minn. 537, 50 N. W. 611; Ling v. St. Paul, M. & M. R. Co., 50 Minn. 160, 52 N. W. 378; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556; Van Den Heuvel v. National F. Co., 84 Wis. 636, 54 N. W. 1016.

There was no hidden danger which was known, or ought to have been known, to defendant and unknown to the plaintiff. The plaintiff knew as well as any one that the boiler might roll unless blocked. He stood by the wheel which, it is claimed, did sink into the ground. His opportunities for knowing the exact situation were superior to those of defendant. Gavigan v. Lake Shore & M. S. R. Co. (Mich.) 67 N. W. 1097; Capper v. Louisville, E. & St. L. R. Co., 103 Ind. 305, 2 N. E. 749; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Paule v. Florence M. Co., 80 Wis. 350, 50 N. W. 189; Reed v. Stockmeyer, 74 Fed. 186; Bailey's Master's Liability, 220; Van Den Heuvel v. National F. Co., supra.

[1] Reported in 69 N. W. 713.

John M. Rees, for respondent.

COLLINS, J. This is a personal injury case, in which a dismissal was ordered at the close of plaintiff's evidence, and then, upon motion, the court granted a new trial.

The plaintiff was in defendant's employ as a laborer, his principal work being in the engine room as a "wiper." One Wright was the chief engineer, and had charge of the men employed about the plant, usually 12 in number. In December, 1894, defendant had occasion to move some heavy iron boilers which had been stored upon its premises, and one evening Wright called plaintiff and another man from the engine room to assist in loading one of these boilers upon a truck. It was after dark, but the electric light in the vicinity gave sufficient light for the work in hand.

The boiler to be loaded lay on top of others which rested upon timbers lying on the ground, was 14 feet in length, 42 inches in diameter, and was cylindrical. The truck was placed parallel with the boilers, about four feet distant, and two skids were used, one end of each being laid upon the under tier of boilers, the other ends upon the platform of the truck, the ends last mentioned being a little lower than those on the boilers; and, to control the movement of the one to be loaded, one end of a snub rope was made fast to the boilers which were to remain, and the rope itself passed around the other, and then held and managed by one of the men who was assisting the plaintiff and others in the work.

There was testimony tending to show that Wright directed all of these movements. When the boiler reached its place on the platform of the truck, Wright ordered plaintiff to take away the skid nearest him at the rear of the truck, and he stepped between it and the boilers lying on the timbers, seized the skid, and threw it upon or towards these boilers. At the same time Wright ordered another man to remove the other skid, and this was done immediately. Wright then ordered plaintiff to loosen the rope where it had been fastened. He turned his back towards the truck for this purpose, and had just commenced to unfasten the rope, when the boiler rolled off the truck, struck him, and caused the injuries complained of.

The truck was furnished with iron side pins, and there was an abundance of wood blocking lying on the ground, but no effort

was made to block the boiler as it lay on the platform of the truck until just as it commenced to roll, and then an attempt proved unavailing. The evidence also tended to show that the ground upon which the wheels of the truck stood was solid on the side away from the boilers, while on the side nearest thereto it was soft, so that, when the boiler was on the truck, its weight caused one hind wheel to sink into the ground several inches, thus to incline the platform of the vehicle, and to facilitate the rolling in that direction, and that Wright knew of this condition of the ground.

On these facts we have first to inquire if it was for the jury to determine in what capacity Wright was acting when the boiler was being loaded. Was he a vice principal of the defendant, or was he simply a fellow servant of the plaintiff? We have stated that he was the chief engineer, having charge of all of the men at work about the plant. He was the superintendent, and had and exercised control over the establishment and the employés. He was, so far as was shown by the evidence, the sole representative of the defendant corporation, and for two years had given plaintiff his orders, to the exclusion of all other persons. On the night in question he ordered the plaintiff to go from the engine room outside, and assist in loading the boiler; and while the work, which was difficult, and required the exercise of skill to avoid accidents to the men as well as to the article to be moved, was being done, he seems to have directed the same, and to have exercised full authority over the men employed. The jury would have been justified in finding that what Wright did on this occasion pertained to his duty of superintendence as a foreman, in which position he represented the defendant as master, and that as such foreman he was a vice principal.

This being so, the next inquiry is whether there was evidence upon which the jury could have found that Wright failed to exercise ordinary care to protect plaintiff from unusual danger; and of this there seems to be little doubt, when we consider that Wright, without taking any precaution to prevent this heavy cylindrical body from rolling,—without causing it to be blocked upon the truck, so that it could not roll off,—ordered the plaintiff to remove one of the skids, and another workman to remove the other, either of which would materially prevent the movement of the boiler to-

wards the side it had been loaded from, and then ordered him to loosen the snub rope, both acts necessarily to be performed in an extremely dangerous place should the boiler roll in that direction. Upon the evidence it was for the jury to say whether or not the representative of the master, having and exercising control over the men and the work they were engaged in, was negligent when he gave orders to plaintiff which brought him between the truck and the boilers lying upon the timbers. See Carlson v. Northwestern T. E. Co., 63 Minn. 428, 65 N. W. 914; Abel v. Butler-Ryan Co., 66 Minn. 16, 68 N. W. 205.

The trial court erred when it dismissed the case, and hence the order granting a new trial must be sustained.

Order affirmed.

CANTY, J. I am of the opinion that it conclusively appears from the evidence that Wright was a foreman under whom plaintiff worked, but it was a question of fact for the jury whether or not Wright was, under all the circumstances, a vice principal, for whose negligence the master is liable. As to the principles on which the jury are to proceed in determining whether or not Wright was a vice principal, it seems to me the majority opinion is very indefinite, if not wholly silent.

In my concurring opinion in Abel v. Butler-Ryan Co., supra, I have stated quite fully the principles on which I believe this question should be submitted to the jury.

Here, as in that case, the jury would have been justified in finding that the work was of a character which required a high degree of skill and foresight in the foreman, and but little skill or experience in the inferior servants under him, and that these inferior servants were not able to exercise the skill necessary for their own protection, and could not be expected to do so. The work was of a temporary character, and was being performed by unskilled laborers, who were taken from other kinds of employment, and had not served long enough in this new employment to become familiar with its dangers. If the work had been long continued or of a permanent character, so that the men would have had sufficient opportunity to become familiar with and to appreciate the dangers, the case would be different.

Again, there were some dangers which the men, even with their short term of experience, should appreciate, and, as stated, there were others which they might not. They knew that the boiler was round, and that, if the platform of the truck inclined towards the side from which the boiler was loaded, the latter might roll off, and injure them. Common laborers, as inexperienced as they were in this work, should know and appreciate this. And if the platform of the truck was thus inclined at the time the boiler was being rolled onto it, the plaintiff should not recover. In that case there was no disparity of knowledge or skill between him and the foreman as to the particular danger causing the injury; they stood on a substantial equality. But if the platform of the truck was not thus inclined while the boiler was being loaded, but became so afterwards, because the great weight of the boiler sunk the wheels on that side of the truck into the soft ground, the case may be different.

Here was a somewhat complicated and unusual condition of things, which an ordinary common laborer might not have the forethought to look out for, and such a laborer, engaged as this plaintiff was, might not have had the time or opportunity to observe the effect which the weight of the boiler thus had on the truck. On the other hand, it may be that a competent foreman should have had the skill and forethought to anticipate the effect of the great weight of this boiler on the truck on this soft ground, or should have observed the effect after the boiler was placed on the truck, and should have acted accordingly in giving orders to plaintiff.

These are all questions for the jury to consider; and if they find the facts to be as here supposed, and that substantial disparity existed between the foreman and plaintiff in these respects; that plaintiff was injured by reason of the want of skill, forethought, or experience which he did not have, and which such a common laborer could not be expected to have, but which a competent foreman should have and exercise for the safety of such laborer,—then the foreman was a vice principal, for whose negligence the master is liable.

If the jury find that the foreman was a vice principal as respects the particular danger which brought about the injury, then the

next question for them to determine is whether or not he was negligent in the discharge of his duties as such vice principal, and whether such negligence caused or contributed to the injury.

LEROY BROWN v. VILLAGE OF HERON LAKE.[1]

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January 7, 1897.

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Nos. 10,328—(183).

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Statute of Limitations—Amendment—Action for Personal Injuries.

Laws 1895, c. 30, amending G. S. 1878, c. 66, § 8 (G. S. 1894, § 5138, subd. 1), did not operate as a repeal or amendment of section 5136, subd. 5, wherein it is provided that the six-year statute of limitations shall apply to actions for injuries to the person or rights of another, not arising on obligation, and not thereinafter enumerated. The amendment falls within the doctrine of ejusdem generis, and applies only to actions based upon wrongs of a like nature to those specifically mentioned in section 5138 as it stood originally.

Action in the district court for Jackson county to recover for personal injuries resulting from the negligence of defendant in maintaining a defective sidewalk. From an order, Severance, J., overruling a demurrer to the fifth paragraph of the answer, which set up the statute of limitations as a defense, plaintiff appealed. Reversed.

Wilson Borst, for appellant.

L. F. Lammers, for respondent.

COLLINS, J. If by the amendment (Laws 1895, c. 30) to G. S. 1878, c. 66, § 8 (G. S. 1894, § 5138), the right of action set out in the complaint herein is barred by limitation if not brought within two years, the demurrer was well taken, and the order appealed from will have to be affirmed. If, however, as urged by counsel for appellant, the amendment did not have that effect, the right to bring action remains for six years, being governed by G. S. 1894, § 5136, subd. 5, and the order will have to be reversed.

[1] Reported in 69 N. W. 710.

We are of the opinion that the act of 1895 fails to amend the fifth subdivision of the section last referred to, and is not applicable to that class of wrongs covered by it, namely, injuries to the person or rights of another, not arising on obligation and not afterwards enumerated.

The amendatory legislation was aimed directly at section 5138, subd. 1, which fixes the limitation at two years as to certain specified acts of commission, namely, libel, slander, assault, battery, or false imprisonment, and the amendment added the words, "or other tort resulting in personal injury." There was no pretense at interference with section 5136, in the fifth subdivision of which the right of action, when the wrong or injury resulted from acts of omission, was limited to six years. No part of this subdivision was repealed unless by implication, and such repeal is not favored, nor was there any provision in the amendatory statute repealing inconsistent acts.

It is not a case where the later act revises, amends, and sums up the whole law on the particular subject to which it relates, covering all of the ground treated of in the earlier statute, and thus plainly showing that it was intended to supersede any and all prior enactments on that subject-matter. Nor is it a case where the amendatory statute is clearly intended to prescribe the only rule which should govern, and therefore must be construed as repealing the statute which had theretofore controlled.

We think, if it had been the deliberate intention to amend or repeal subdivision 5, that the legislature would have done it directly, and would not have left it to be inferred, for there is no irreconcilable repugnancy between sections 5136 and 5138 as they now stand. This being so, and, even where the legislative intent is simply doubtful, it being our duty to use every effort to make all acts stand, and to construe statutes in pari materia when they can be reconciled, we conclude that the doctrine of ejusdem generis should be applied to section 5138, as amended, and that the amendment was designed to apply only to that class of wrongs of a like nature to those specifically mentioned in the original act or section. The general rule is that, where there are general words following particular and specific words, the former must be confined to things of the same nature and kind, and there are no exceptions

to the rule which will take the amendment in question out of this general rule. A large class of civil wrongs of the same nature as those particularly specified might easily be named, and it is to these that the amendment refers and has application, and not to all.

Order reversed.

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CARL M. JOHANSON, Administrator, v. CELIA HOFF, Administratrix.[1]

January 7, 1897.

Nos. 10,399—(160).

Appeal—Review—Reception of Evidence.

Held, that the question argued by counsel, as to the competency and admissibility in evidence of admissions tending to affect and bind the estate of a person under guardianship on account of habitual drunkenness, made after the inquisition and appointment of a guardian for the estate as well as the person, is not, on the present record, before us for determination.

Evidence—Objection Taken under Advisement.

In a trial before the court without a jury, and for the purpose of laying the foundation for the introduction of testimony given by a witness (who was unable to be present and whose deposition could not be taken on account of his severe illness) at a former trial of the same case, respondent offered in evidence the affidavits of two physicians, and appellant's counsel duly objected, whereupon the court stated, "Evidence received, subject to the objection." No further ruling was made, and the testimony of the absent witness, as taken by the official stenographer at the former trial, was then received in evidence without objection. *Held*, that the statement of the court, when objection was made to the affidavits, amounted to nothing more than taking the objection under advisement, and that, as there was no further ruling, the question argued by counsel, and which would have been presented had the court overruled the objection, directly or indirectly, is not before us.

From an order of the probate court for St. Louis county disallowing his claim against the estate of Nels J. Hoff, deceased, plaintiff appealed to the district court of that county. The case was tried

[1] Reported in 69 N. W. 705.

before Morris, J., who found that plaintiff was entitled to allowance of his claim of $435. From an order denying a motion for a new trial defendant appealed. Affirmed.

Geo. L. Spangler, for appellant.

Fryberger & Johanson, for respondent.

COLLINS, J. For a second time this case appears before us on appeals from orders denying defendant's motions for a new trial. The facts are sufficiently stated in the former opinion. 63 Minn. 296, 65 N. W. 464. The second trial was had before the court without a jury, and upon its findings of fact judgment was ordered in favor of plaintiff. Although counsel for defendant has set forth 43 assignments of error, we are of the opinion that two questions only need consideration. In fact, counsel himself is content to dispose of 17 of his assignments quite summarily by stating, in his brief, that no argument is necessary.

The first of the questions to which we have referred relates to the competency and admissibility of the evidence of several witnesses tending to show that, in his lifetime, and after the execution of the lease, defendant's intestate, Nels Hoff, made certain admissions or statements to the effect that he owed plaintiff's testator, John Erickson, for rent due upon the lease; while the other question is as to the admissibility on this trial of the testimony given by a witness by the name of McGregor upon the former trial, as then taken by the official stenographer.

1. One of plaintiff's witnesses had testified that he was present and overheard a conversation between Hoff and Erickson in reference to the payment of rent due on the lease, and, when counsel for the plaintiff attempted to draw out this conversation, it was objected to as incompetent, irrelevant, and immaterial. The objection was overruled, and defendant's counsel took an exception. The same counsel then stated to the court that he wished it to appear of record that he should show that, at the time of the alleged conversation, Hoff was a ward of the probate court, and was incompetent to make any statements or admissions which would affect his estate. On the examination of other witnesses as to conversations they had heard between Hoff and Erickson, counsel interposed the same objection, and in substantially the same lan-

guage. After all of the evidence of this character was introduced, and after plaintiff had rested his case, defendant offered, and there was received in evidence, certified copies of the records of the probate court, from which it appeared that, prior to the time of these alleged conversations, Hoff had duly been declared an incompetent because of habitual drunkenness, and that the present defendant had been duly appointed guardian of his person and estate, and that, at the time of these conversations, and up to the day of his decease, she remained such guardian.

It will be seen that, when the statements and admissions made by Hoff concerning his indebtedness to Erickson on account of the lease were received in evidence, there was nothing before the court as to the fact that Hoff was then under guardianship, except the bare assertion of counsel. At the time the testimony was received, it was clearly competent and admissible; and the question, argued by counsel, that these statements and admissions could not be received, because made subsequent to the inquisition in the probate court wherein Hoff was adjudged an incompetent and the proper subject for guardianship, is not before us. The rulings of the court, when made and as the case then stood, were correct, although the rule of law may be as contended for by counsel. Upon this we express no opinion.

2. McGregor had testified upon the first trial as a witness for plaintiff. At the second trial, plaintiff's counsel attempted to lay the foundation for the introduction of this testimony, showing that the witness was sick in a hospital in a distant city, unable to travel, and, further, that he was in such a physical condition that it would be unsafe to attempt to take his deposition. A part of this preliminary testimony being received without objection, counsel then offered in evidence affidavits, made by two physicians residing in the city in which the witness then was, for the purpose of laying further foundation for the reception of the testimony taken upon the former trial, and to the introduction of these affidavits defendant's counsel objected. The only ruling made by the court upon this objection was, "Evidence received, subject to the objection." The testimony of the witness as taken by the stenographer upon the other trial was then introduced and received without objection.

It is urged that the ruling relating to the affidavits was erroneous. But the court made no ruling, for, upon a trial before it, without a jury, it simply received the affidavits subject to the objection. Its statement that it would so receive them amounted to nothing more than taking counsel's objection under advisement; and, so far as is shown by the record, no ruling was ever made. Probably the point covered by the objection would have been reserved to counsel, had he made a proper objection to the reception in evidence of McGregor's testimony as given upon the first trial, and his objection had been overruled; but as before stated, no such objection was made. The question argued by counsel, and which would have been presented had the court, directly or indirectly, overruled the objection made to the admission of these affidavits, and received them in evidence without qualification, is not before us for review.

Order affirmed.

W. M. BABCOCK v. AMERICAN SAVINGS & LOAN ASSOCIATION.[1]

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January 12, 1897.

Nos. 10,194—(193).

Foreclosure Sale—Right to Surplus—Mistake of Law—Equitable Relief.

Maudlin v. American S. & L. Assn., 63 Minn. 358, and Truesdale v. Sidle, 65 Minn. 315, followed.

Action in the district court for Hennepin county to recover a surplus arising on a foreclosure sale. The case was tried before Belden, J., without a jury, who found, among other things, that defendant bid in the property for $13,307.90, which was $2,687.97 in excess of the amount due, and that the property was worth at the time of sale $9,880. From a judgment in favor of plaintiff defendant appealed. Affirmed.

Eugene G. Hay and *Chas. M. Cooley*, for appellant.

Jones & Babcock and *John B. Atwater*, for respondent.

[1] Reported in 69 N. W. 718.

BUCK, J. 1. The plaintiff, as assignee of Ole Dahl and Mary Dahl, brought this suit to recover of the defendant an alleged surplus bid by it on the foreclosure of a certain mortgage given to it by said Dahls.

We are of the opinion that the first branch of this case is governed by that of Maudlin v. American S. & L. Assn., 63 Minn. 358, 65 N. W. 645. Appellant's counsel contends that the Maudlin case differs from the case at bar in this: that it was there practically admitted that the property was worth the full amount bid, while in this case the court has found that, notwithstanding the amount bid, the value of the property was actually less than the amount due on the mortgage at the date of foreclosure. Conceding the facts in that case to be as stated by counsel, there was not such a substantial difference as to justify a different conclusion upon the facts from the case under consideration.

The mortgagee or party bidding does so at his peril. If he bids more than the amount due, including expense of sale, he must answer for the surplus, whether the property is really worth more or less than the amount due or the sum bid. The test is, not the value of the property, but the amount bid. If the purchaser bids the exact amount due and expenses, that is the end of the matter, except the right of redemption in accordance with the provisions of the statute. The amount bid is not compulsory, but optional, and the purchaser bids the amount at his own risk. If, each time a bid is made in excess of the actual amount due, a defense can be successfully interposed against recovering the surplus, upon the ground that the property was of less value than the amount due or the amount bid, there might be endless and vexatious litigation upon the question of the value of the property. A mortgagee ought to know the amount legally due on his mortgage, and if, on foreclosure, he bids in excess of this amount, he must abide the consequences. In this case the defendant received a warning and advice from a respectable attorney that the bid it contemplated making was in excess of the amount legally and actually due, and, while it also received advice from other attorneys to the contrary, we perceive no grounds for relief from its bid in excess of the amount due on the mortgage.

2. The appellant further contends that it is entitled to relief up-

on equitable principles, which the court below had a right to apply in its determination of the question in issue, and which this court should determine in the exercise of its appellate jurisdiction. This branch of the case, we think, is controlled by that of Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004. The plaintiff was entirely blameless in the matter, and there was no mistake of facts. The method of foreclosure was deliberately adopted, and the mistake one of law, pure and simple. The result of this litigation may be a hardship for the defendant, but it alone is to blame.

Judgment affirmed.

PARK BROTHERS & COMPANY, Limited, v. EDMUND T. SYKES and Others.[1]

January 12, 1897.

Nos. 10,227—(188).

Village—Contractor's Bond—Validity.

The village of St. James is not expressly authorized by law to take a bond for the security or benefit of third persons. Therefore, *held*, that a bond voluntarily executed for such purpose is void.

Appeal by defendant Brooks from an order of the district court for Hennepin county, Smith, J., overruling a demurrer to the complaint. Reversed.

William W. Bartlett, for appellant.

Ashley Coffman, *J. M. Hawthorne*, and *Lloyd Peabody*, for respondents.

BUCK, J. The village of St. James, containing less than 3,000 inhabitants, contracted with the defendant Sykes to erect a waterworks and electric lighting plant in said village. A bond for the faithful performance of said contract was given by Sykes to said village, with Jabez Brooks and John R. Hazelet as sureties. One of the conditions in said bond is that Sykes should pay for all labor and materials employed in the construction of said waterworks.

[1] Reported in 69 N. W. 712.

The plaintiffs allege that they furnished and delivered to Sykes certain material on credit for the purpose of the erection and completion of said waterworks, and that the same were used for that purpose, and were of the value of $1,049, which Sykes agreed to pay, but neglected to do so; and that there is now due and unpaid from said village to said Sykes upon said contract the sum of $1,049. Plaintiffs also allege that they so furnished said material relying upon said bond. To this complaint one of the defendants, Jabez Brooks, interposed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and the defendant brings this appeal.

It is contended by the defendant that the village of St. James did not have the right or power to take the bond in question for the use or benefit of the plaintiffs, and the case of Breen v. Kelly, 45 Minn. 352, 47 N. W. 1067, is cited in support of this contention.

We are of the opinion that this contention is well founded, and that the latter case controls the one at bar. There is no direct authority from the legislature conferring the power upon villages of less than 3,000 inhabitants to take security for the benefit of third persons, even where the contract provides that work done or material furnished shall be for the benefit of the village itself. Nor does there exist any implied authority upon the part of the village of St. James to take such security. Its power or capacity in this respect is no greater than that of a county, and, as we hold that the case of Breen v. Kelly controls this one, an extended discussion of it is unnecessary.

Order reversed.

START, C. J. I dissent. The doctrine of Breen v. Kelly ought not to be extended, for it is on principle wrong. The powers, express and implied, of municipal corporations proper, such as villages organized under the general laws of this state, are more extensive than those of quasi municipal corporations, such as counties.

Conceding, in deference to the doctrine of stare decisis, that the latter have no power to incorporate in a bond to secure the performance of public work a condition for payment by the contractor

of all labor and materials entering into the work, still it does not follow that the former, by reason of their larger powers, may not have such implied power. Both principle and authority justify the conclusion that villages have such implied power.

It is conceded that they have express power to enter into a contract for public improvements and implied power to take a bond to secure the performance of the contract. But the payment by the contractor for the materials and labor entering into the execution of the contract is a matter in which the village has a direct interest, because such payment tends to secure a prompt and honest execution of the contract by avoiding strikes and the withholding of materials by material men; hence the village has the implied power to take a bond, not only to secure the performance of the contract, but, as a further means of protecting public interests and speeding the work, to include in such bond a condition for the payment of the labor and materials. Certainly a municipal corporation proper has the implied power to be honest; and to so secure, if it so elects, the performance of its contracts for public improvements as to make it certain that what it receives and must retain will be paid for. Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162; Baker v. Bryan, 64 Iowa, 561, 21 N. W. 83; Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Fitzgerald v. McClay, 47 Neb. 816, 66 N. W. 828.

JOHN B. WEBER, Executor, v. ST. PAUL CITY RAILWAY COMPANY.[1]

January 12, 1897.

Nos. 10,334—(144).

Personal Injury — Evidence of Physician — Statement of Injured Party.

On the trial of an action for the recovery of damages for personal injuries alleged to have been sustained by plaintiff's testator by reason of the collision of defendant's street cars while he was a passenger on one of them, in which action the plaintiff's allegation of negligence resulting in such injuries was denied by the defendant, the attending physician was permitted, against objection, to testify that four or five days after

[1] Reported in 69 N. W. 716.

the time of such injury the plaintiff's testator stated to him "that he was sitting in the back part of the car, and did not see this other car that came in collision with this one until it was almost onto them; and that he rose, and grabbed hold of a window, or the side of a window, and just at that time the car struck and wrenched him around, and threw him partly on the floor and partly on the opposite seat of the car." *Held* error.

Appeal by plaintiff from an order of the district court for Ramsey county, Brill, J., granting a motion for a new trial. Affirmed.

John A. Lovely, *J. F. George*, and *C. D. & Thos. D. O'Brien*, for appellant.

If there was error on the part of plaintiff's counsel on the McCord incident, defendant's counsel are in pari delicto. See Hayne, New Trial, § 108; Turner v. McIlhaney, 8 Cal. 575; People v. Montgomery, 53 Cal. 577. If the verdict is undeniably correct a new trial will not be granted, notwithstanding the admission of improper testimony. State v. Engle, 1 Zabriskie, 347; Stephens v. Crawford, 1 Kelly, 574; McMulley v. Mayo, 8 S. & M. 298; Van Cort v. Van Cort, 4 Edw. Ch. 621; Carlock v. Spencer, 2 Eng. (Ark.) 12; Allen v. Parish, 3 Ohio, 107; Smith v. Kerr, 1 Barb. 155; Bradford v. Pearson, 12 Mo. 71. The erroneous admission of evidence which does not affect the result, or which refers to facts established by other testimony, is not ground for new trial. In re Yetter's Estate, 55 Minn. 452, 57 N. W. 147; Jones v. Snow, 56 Minn. 214, 57 N. W. 478; Steiner's Exec. v. Eppinger, 23 U. S. App. 344, 9 C. C. A. 483, and 61 Fed. 253; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288.

A patient's description of his symptoms, sufferings and injuries, made to his attending physician for the purpose of receiving treatment, are competent. Brusch v. City R. Co., 52 Minn. 512, 55 N. W. 57; Johnson v. Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473; Cooper v. City R. Co., 54 Minn. 383, 56 N. W. 42. The repetition by the physician as a witness of symptoms stated to him by the patient is competent and not hearsay. Barber v. Merriam, 11 Allen, 324; Aveson v. Kinnaird, 6 East, 188; Rogers v. Crain, 30 Tex. 284; Quaife v. Chicago & N. W. R. Co., 48 Wis. 513, 4 N. W. 658; Hagenlocher v. Coney Isl. & B. R. Co., 99 N. Y. 137, 1 N. E.

536; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280; Atchison & C. R. v. Frazier, 27 Kan. 463; Louisville, N. A. & C. R. Co. v. Falvey, 23 Amer. & Eng. R. Cas. 522, 3 N. E. 389; Merkle v. Bennington Tp., 58 Mich. 157, 24 N. W. 776; Mulliken v. City of Corunna (Mich.) 68 N. W. 141.

Munn, Boyesen & Thygeson, for respondent.

The testimony of Dr. McCord as to Weber's statement of how he was injured was clearly incompetent. The declarations of the party to his physician must relate to the present and not to the past. Rogers, Exp. Test. § 47; Fort Worth & D. C. R. Co. v. Stone (Tex. Civ. App.) 25 S. W. 808; Chapin v. Inhabitants, 9 Gray, 244; Roosa v. Boston L. Co., 132 Mass. 439; Emerson v. Lowell G. L. Co., 6 Allen, 146; Bacon v. Inhabitants, 7 Cush. 581; Illinois C. R. Co. v. Sutton, 42 Ill. 438; Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011; Merkle v. Bennington Tp., supra; Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463; Texas & N. O. R. Co. v. Crowder, 70 Tex. 222, 7 S. W. 709; Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694; Taylor v. Grand Trunk R. Co., 48 N. H. 304; Fitzgerald v. Town of Weston, 52 Wis. 354, 9 N. W. 13; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 336, 15 Sup. Ct. 830; Firkins v. Chicago G. W. R. Co., 61 Minn. 31, 63 N. W. 172; Eastman v. Boston & M. R. Co., 165 Mass. 342, 43 N. E. 115.

Appellant's counsel practically concede our contention, but they maintain it did not constitute prejudicial error. If error is committed by the trial court the presumption is that it was prejudicial, and the party against whom such error is committed is entitled to a new trial, unless it conclusively appears that he was not prejudiced thereby. Brown v. Cranberry I. & C. Co., 18 C. C. A. 444, 72 Fed. 96; Deery v. Cray, 5 Wall. 795; Boston & A. R. Co. v. O'Reilly, supra; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118; Fort Worth & D. C. R. Co. v. Stone, supra.

BUCK, J. The plaintiff's testator, John E. Weber, was a passenger upon a street car of the defendant company operated upon West Seventh street in the city of St. Paul, and while he was such passenger, on November 1, 1893, a collision took place on that line between two of the street cars of the defendant company; and it

is claimed that in such collision, and by reason thereof, he received severe personal injuries, and this action was brought to recover damages for the same. The action was commenced by Weber and tried in the month of February, 1895, and the jury returned a verdict in his favor for the sum of $9,250. Weber, for some cause, was physically unable to be present at the trial, and by reason of his mental and physical condition his deposition could not be taken and used on the trial. Motion for a new trial was made by the defendant, but, before its hearing, Weber died, and John B. Weber was substituted as plaintiff herein. Subsequently, the court below granted a new trial, and plaintiff appeals.

The only question which we deem it necessary to consider arises upon the admission of certain evidence against the objections of the defendant. The plaintiff called as a witness in his behalf Dr. McCord, who testified that he saw him (John E. Weber) on November 4 or 5, 1893, and talked with him about his condition and injuries; and from the record we quote so much as embraces the objectionable testimony given by Dr. McCord:

"Q. What took place between you and the plaintiff at that time, touching his treatment? A. Well, he called me in the front room, and told me that he would like to try and find out what was the trouble with him. He complained of a great deal of pain in the back— Q. What part of the back? A. In the small of the back,—a great deal of pain in the back; and he complained of a very severe headache, and he said he felt nervous and weak. Q. What did he say as to any injuries he had received? A. I asked him about his accident at that time. He said he was sitting in the car, towards the back end of it, and that— Mr. Munn: In order to preserve our record, we object to this as incompetent, immaterial, inadmissible, and hearsay testimony. The Court: Well, are his declarations as to how he was injured admissible? Mr. O'Brien: I think it is competent when made to a physician—his statement of how he was injured —with reference to the treatment. It is one of the subjective symptoms. It is always competent. (Overruled. Exception by defendant.) Q. Go on, Doctor. A. He told me that he was sitting in the back part of the car, and didn't see this other car that came in collision with this one until it was almost onto them, and that he arose, and grabbed hold of a window, or the side of a window, and just at that time the car struck and wrenched him around, and threw him partly on the floor and partly on the opposite seat of the car. Q. Did he state what part of his body had come in contact with any part of the car? (Same objection, ruling, and exception.) A. No; I don't know that he did."

In view of the complications which may arise upon a new trial by reason of the death of plaintiff's testator, we have made a careful investigation of the facts and the law, and, in our opinion, the order granting a new trial must be sustained. That Weber was a passenger upon defendant's car at the time of the collision is conclusively established; that the collision was one of great violence is equally well established; and that soon after the injury he appeared to suffer from some physical infirmity, and eventually died, after much suffering, admits of but little, if any, controversy. But the main issue related to the cause of the injury, or his physical sickness, suffering, and ultimately to the cause of his death. The complaint states the cause of action to be

"That the said plaintiff was thrown forcibly against the car on which he was a passenger as aforesaid, severely injuring his back, head, and spine and other portions of his body, so that he became and was thereby made sick, sore, lame, and disabled, and was shortly after compelled to take to his bed, to which he has been confined ever since, and became paralyzed and blind by reason of said injuries, and has been unable to move any portion of his body, and is otherwise disabled, and will never recover from said injuries."

This allegation of the complaint was denied by the answer.

Several physicians on the part of the plaintiff testified that Weber was suffering from traumatic neurosis or disease of the nerves caused by violence, and it therefore became an important factor in plaintiff's behalf to show that he suffered from violence in this collision. While there were some four or five other passengers upon this car at the time of the collision, one of whom, at least, was injured, and one was not, none of them were able to testify to any injury to Weber except one, who said that he saw Weber standing at the lower end of the car, seeming quite pale and sort of dazed, and another witness, who testified that he saw Weber outside of the car after the accident, having a little blood on his handkerchief, but did not know where it came from. It also appeared in evidence that Weber stated, the evening after the accident, that he thought that he had sprained his back.

Upon this state of the evidence Dr. McCord was permitted, against objection, to give in evidence the statements Weber made to him some four or five days after the accident. The vice in this evidence is found in the statement that Weber told him that the car struck

and wrenched him, and threw him partly on the floor and partly on the opposite seat of the car. If this statement was true, its probative force is quite apparent. Such evidence could not have reached the minds of the jury with any other than a harmful effect. This alleged fact was not testified to or contradicted by any witness. That plaintiff's counsel recognized its great cogency in behalf of his case is shown by his persistency in refusing to have it struck out, or even withdrawn from the consideration of the jury at the close of the evidence, notwithstanding the suggestions and doubt of the trial court as to its admissibility.

This evidence was clearly inadmissible. Firkins v. Chicago G. W. R. Co., 61 Minn. 31, 63 N. W. 172. The rule is well settled that it is competent for a physician to testify as to the present physical condition of his patient, and what he said as to such condition, particularly as to ills, pains, and symptoms arising from an accident or sickness; but anything in the nature of past events, such as the cause of the injury or sickness, must be excluded, and is inadmissible in an action for the injury. Especially should this rule be applied where several days, or a long period, has elapsed, thus affording opportunity for simulated statements of the manner or cause of the injury or sickness by interested parties. We have considered all points raised and discussed by counsel, but do not deem a consideration of them necessary, further than appears in the foregoing opinion.

Order affirmed.

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OWEN J. EVANS v. RHODE ISLAND HOSPITAL TRUST COMPANY.[1]

January 12, 1897.

Nos. 10,379—(259).

Mortgage Foreclosure—Redemption.

Where a mortgage by its terms draws interest at the rate of 5½ per cent. per annum, and is foreclosed by advertisement, the real property thus sold may be legally redeemed by the mortgagor, his heirs, executors, administrators, or assigns, as the case may be, by paying the sum of money for which the same was sold, together with interest on the same from the time of sale at the rate of 7 per cent. per annum.

[1] Reported in 69 N. W. 715, 1069.

Appeal by plaintiff from an order of the district court for Hennepin county, Jamison, J., denying a motion for a new trial. Affirmed.

F. B. Hart, for appellant.

W. J. Hahn and *J. M. Martin*, for respondent.

BUCK, J. It was stated by counsel upon the argument of this case that the only question to be determined was the construction to be placed upon G. S. 1894, § 6041, which reads as follows:

"The mortgagor, his heirs, executors, administrators or assigns, whose real property is sold in conformity to the provisions of this act, may, within twelve months after such sale, redeem such property as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale: provided, that no redemption shall be made for real property sold in conformity to the provisions of this act, when the mortgage foreclosed contains a distinct rate of interest more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon, from the date of sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum: provided, that when no rate of interest is specified in the mortgage, the rate of interest after sale shall be seven per cent. per annum on the amount for which the property was sold."

The defendant is a corporation, organized under the laws of, and located in, the state of Rhode Island. On July 1, 1889, plaintiff negotiated a loan of the defendant in the sum of $40,000, and gave his note therefor, due July 1, 1894, and secured the same by a real-estate mortgage on property in the city of Minneapolis. The note and mortgage drew interest at the rate of 5½ per cent. per annum before and after maturity, payable semiannually.

Default having occurred in the payment of one interest coupon, the defendant elected, under the terms of the mortgage, to declare the entire debt due, and foreclosed the mortgage by advertisement, and on February 17, 1893, caused said premises to be sold by the sheriff of Hennepin county, at which sale the defendant bid in the mortgaged property for the amount of its principal debt, interest, and costs, making the aggregate sum of $42,535, and a certificate of sale was executed accordingly, as required by law.

On December 30, 1893, the plaintiff sought to make redemption

from said sale by paying the sum of money for which the property was sold, with interest thereon at the rate of 5½ per cent. per annum, according to the terms of the notes and mortgage, which the defendant refused to accept, but contended that it was entitled to be paid the sum for which the property was sold with interest thereon at the rate of 7 per cent. per annum from the time of sale to the date of redemption. Nor did the plaintiff then tender to the defendant, nor to the officer who made the sale, the sum for which the property was sold, nor any interest thereon, nor furnish to either any evidence of his right to redeem, as provided by G. S. 1894, § 6042; but subsequently the plaintiff, pursuant to the demand of the defendant, paid to it the sum of $45,153.73, being the amount for which said property was sold at foreclosure sale, with interest thereon at the rate of 7 per cent. per annum.

There was also paid by plaintiff, at the same time, the sum of $67.50, cost of exchange on New York on the amount paid, as the defendant was a resident of the state of Rhode Island. The plaintiff also paid $30 insurance money, which amount had previously been paid by the defendant on the mortgaged property. Payment of these two last items we do not consider, in view of the fact that the trial court found that the entire payment was made voluntarily on the part of the plaintiff, and we think justified by the evidence, and also for the reason that counsel upon the oral argument stated that the only question to be determined was the construction to be placed upon section 6041 of the statute, which we have quoted.

The action is to recover the difference between the amount the premises were bid off for at the foreclosure sale, with interest at 7 per cent. per annum, actually paid by the plaintiff on redemption, and the amount of such bid, with interest thereon at the rate of 5½ per cent., which plaintiff claims that he should only have been compelled to pay to redeem the premises from such foreclosure sale. We leave out of this statement of what the action was brought to recover the amount of exchange and insurance for the reason above stated.

The action is, in fact, one to recover money had and received, amounting to the sum of 1½ per cent. interest per annum upon the amount bid at the foreclosure sale up to the time of the redemption by payment of the principal and 7 per cent. interest. What rate

of interest, then, should be computed on the amount bid at the foreclosure sale?

The appellant contends that the contract between the parties, viz. the mortgage contract, was not changed or modified by the foreclosure sale, based upon the proposition that the debt was not satisfied by the sale.

The general rule is, and we think now quite well settled, that upon a foreclosure sale of the property, by advertisement or action, the mortgage debt, as a personal obligation, is extinguished to the amount of the purchase money bid at the sale. If the mortgagee or a third party bid off the premises for the full amount of the debt secured and expense of sale, there is no longer an unpaid or unsatisfied existing contract upon which either further foreclosure proceedings or right of action could be had, because the debt secured as a personal obligation is paid by sale, whether the premises are actually worth more or less than the sum actually bid and paid, and is converted into a mere lien on, or defeasible estate in, the land. The mortgagor's right in the premises is not entirely extinguished by a foreclosure sale, because, until the expiration of the time for redemption, he has an equity, and may have his right in the property completely restored by redeeming upon the terms and conditions imposed by law.

When the mortgagee bids at the foreclosure sale the full amount of the secured debt and expenses, he becomes a purchaser, instead of a contract creditor, and holds the property by virtue of his bid, and upon conditions fixed by law for its redemption; and the contract rate of interest existing before the sale is merged or expires with such sale, and further interest upon the amount bid until redemption springs into life by virtue of the law fixing and defining the rate from the time of such sale. Therefore that part of G. S. 1894, § 2212, which provides that all contracts shall bear the same rate of interest after they become due as before is not applicable to the question in the case at bar. In support of the foregoing views in regard to the extinguishment of the secured debt to the amount of the purchase money bid we cite the following authorities: American B. & L. Assn. v. Waleen, 52 Minn. 23, 53 N. W. 867; Pioneer S. L. Co. v. Farnham, 50 Minn. 315, 52 N. W. 897; Jones, Mortg. (5th Ed.) § 953, and cases there cited.

Now, as the rights of the parties were measured by the terms of the statute after the foreclosure sale, we refer to section 6041 as a guide or rule of proceeding for the parties. By it the mortgagor is permitted, within 12 months after the sale, to redeem the property by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale, subject, however, to the further qualifications and conditions fixed by the provisos in said section contained.

These provisos are that, when the mortgage contains a distinct rate of interest more than 7 per cent., the party redeeming must pay the rate of interest specified in the mortgage, not exceeding 10 per cent., and, when no rate of interest is specified in the mortgage, the rate of interest after sale shall be 7 per cent. per annum on the amount for which the property sold. It is quite evident that these provisos have no bearing upon the rate of interest under consideration, because the mortgage in question bore interest at the rate of 5½ per cent. per annum, and the rate of interest to be paid upon redemption from foreclosure sale comes within the first clause of the section, viz. by simply paying "interest" on the sum for which the premises were sold. The provisos take nothing out of the body of the act, either by their language or spirit, and cannot be said to affect its terms.

While the interest to be thus paid upon redemption from foreclosure sale is not a contract interest, it is one fixed by law, payable as a condition precedent to the right of redemption, and the purchase money bid and paid for this purpose is a legal indebtedness, within the meaning of G. S. 1894, § 2212, providing that interest for any legal indebtedness shall be at the rate of $7 upon $100 for a year.

The order appealed from is therefore affirmed.

The following opinion was filed January 29, 1897.

PER CURIAM. Petition for rehearing or modification of the opinion in this case.

Giving to the appellant's counsel the benefit of his contention that he did not state, nor intend to be understood as saying or admitting, on the oral argument, that the only question to be deter-

mined was the construction to be placed upon G. S. 1894, § 6041, yet the conclusion at which we arrived ought not to be changed or modified. The payment of $30 insurance and $67.50 cost of exchange were not paid under duress, but were paid voluntarily by the plaintiff. He preferred to make these payments rather than incur the expense of going to Providence, R. I., where defendant resided, and make payment there, and also to avoid the necessity of paying a large sum to the sheriff as his fees in receiving and paying over the redemption money, if such redemption money was paid to him.

Petition denied.

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71 426

FRANK RILEY and Another v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

January 12, 1897.

Nos. 10,419—(128).

Struck Juries—Procedure—Waiver of Objection.

Laws 1895, c. 328, § 1, providing for struck juries, requires the sheriff to attend at his office at a time designated for striking a jury, and in the presence of the parties or their attorneys, or such of them as attend for that purpose, select, from the number of persons qualified to serve as jurors in the county, 40 such persons as he shall think most indifferent between the parties and best qualified to try such issue; and then the party requiring such jury, his agent or attorney, shall first strike off one of the names, and the opposite party, his agent or attorney, another, and so on, alternately, until each has struck out 12. *Held*, that where a party appears at such time and place, and takes part in striking the names from a list previously prepared by the sheriff, without objection, he waives the right to raise an objection thereafter as to this irregularity, if any, in the manner of thus selecting a struck jury.

Same—Impartiality.

Held, also, that the trial court should have heard evidence as to the impartiality of the list selected by the sheriff, and then exercised his judgment as to whether it was impartial; and that it was error not to do so.

Same—Right of Party.

Held, further, that under Laws 1895, c. 328, § 1, a party is entitled to have the jurors called as they stand upon the panel.

[1] Reported in 69 N. W. 718.

Appeal by plaintiff and intervenor, Fire Association of Philadelphia, from an order of the district court for Winona county, Gould, J., denying a motion for a new trial, after a verdict in favor of defendant. Reversed.

P. Fitzpatrick and *Brown & Abbott*, for appellants.

M. B. Webber, for respondent.

BUCK, J. The plaintiff was the renter of a farm upon which were situate a barn, hay, farm implements, machinery, and straw stack, which he alleges were set on fire by the defendant's locomotive engine through its negligent operation, and by reason of its being out of repair. The property was insured by the intervenor insurance company in the sum of $500, which it paid plaintiff, and it was then permitted to intervene in the action.

Before the trial the defendant's attorney filed a demand for a struck jury, and notice was given to the attorneys for the plaintiff and intervenor that the jury would be struck at the sheriff's office at the hour of 5 o'clock p. m. on September 9, 1895. At that time and place the attorneys for the respective parties assembled, and the sheriff then and there presented to them, from which to strike the jury, two sheets of paper, each containing 40 names, the one paper being a duplicate of the other. These lists of names so presented were prepared by the sheriff hours before the time appointed, and no names upon the said lists were selected in the presence of the attorneys or at the time appointed. The plaintiff and intervenor procured an order to show cause why the said jury panel should not be quashed because none of the names selected as aforesaid were selected at the time appointed, or in the presence of the parties or their attorneys. The defendant's attorneys appeared at the time and place designated for selecting the jurors, but made no objection to the method of their selection. Instead of doing so, they took part in selecting the names; and hence we are of the opinion that they waived any right to raise the objection thereafter as to any irregularity on the part of the sheriff in doing so, although upon the merits of this question we express no opinion.

The plaintiff made a motion to quash the list or panel on the ground (supported by affidavits) that a large number of those selected by the sheriff were, or had been, more or less intimately con-

nected with defendant's counsel as clients, or in a business way, to such an extent as to affect their competency as impartial jurors. The trial court held that he

"Would not make any ruling against the jury on that ground, and it would be useless to make any objection to that, unless [plaintiff] could show that the sheriff had knowledge of that fact when he drew them."

In this the court erred. If the sheriff selects a partial or unfair list,—as, for example, largely of the personal friends or neighbors of one of the parties, or persons who from business interests are presumably biased in favor of one side of the issue to be tried,—it is the duty of the court to set aside the list on a motion in the nature of a challenge to the array, or to quash the panel. Lommen v. Minneapolis G. Co., 65 Minn. 196, 68 N. W. 53. At common law (where a common jury was also returned by the sheriff) a challenge to the array could be made only upon account of partiality or some default in the sheriff. 3 Bl. Comm. 357. But we do not understand that it was necessary to establish affirmatively intentional partiality on his part. If the panel returned by him was in fact composed of partial or otherwise unfit or incompetent jurors, this would be sufficient ground for quashing it without showing intentional wrong on part of the sheriff. Whatever might have been the result of the inquiry, the court ought to have heard the motion on its merits.

Another ground of error assigned by appellant is that the jurors were not called in the order in which they stood upon the panel. The challenge upon this ground was taken in writing to the jury before they were sworn, and this ground was plainly and distinctly made, and the facts duly specified. Thereupon the defendant took exception to the challenge, and the court found the challenge not true. By excepting to the challenge, instead of denying it, its sufficiency was thereby raised, and the facts alleged in the challenge must be deemed to be true. The facts being admitted by the challenge, the court passed upon its sufficiency as a matter of law. Laws 1895, c. 328, § 1, provides the method for selecting a struck jury, and said section further provides that:

"When each party has stricken out twelve names, as aforesaid, the sheriff shall make a fair copy of the names of the remaining sixteen

persons, and certify the same under his hand to be the list of jurors struck for the trial of such cause or proceeding and shall deliver the same to the clerk, who shall thereupon issue and deliver to the sheriff or other officer, a venire facias, with the names in said list contained annexed thereto; and such sheriff or other officer shall summon the persons named, according to the command of such writ; and upon the trial of the cause, the jury so struck shall be called as they stand upon the panel and the first twelve of them who shall appear, and are not challenged for a cause, or set aside by the court, shall be the jury, and shall be sworn to try the issue joined in said cause or proceeding."

We think that this provision of the statute is mandatory. The jurors must be called as they stand upon the panel. This right is not an inconsequential one.

This struck-jury law is one under which many abuses may arise, and to permit jurors to be drawn in a different order from that in which they stand upon the panel is one of them. There is a possibility that the 12 jurors first called will be the ones who will try the case. Upon this possibility either party has a right to rely in striking out the names of the objectionable jurors in the first instance, and he may leave the least objectionable ones at the foot of the list as being the ones less likely to be called as they stand on the panel. To have these objectionable names transposed, and called first, is not in accord with the spirit or letter of the law. It is not a sufficient answer to say that the party may challenge for cause. If the jurors are drawn as they stand on the panel, he may not be compelled to challenge for cause, and to compel him to do so is to run a risk not contemplated by the law itself.

The law is too plain to need interpretation or construction, and it was written for a purpose, and that purpose is expressed in no uncertain terms, and should be given full mandatory force. The trial court therefore erred in holding the challenge not true.

Order reversed, and new trial granted.

AUSTIN F. KELLEY v. HIRAM P. GALLUP.[1]

January 14, 1897.

Nos. 10,107—(119).

Constitution—Laws 1889, c. 91.

Laws 1889, c. 91, reducing the time within which an action for the recovery of real estate may be brought from 20 to 15 years, was constitutionally passed. Miesen v. Canfield, 64 Minn. 513, followed.

G. S. 1894, § 5147—Subsequent Disability.

G. S. 1894, § 5147, construed, and *held*, that the disability which will arrest the running of the statute of limitations must exist at the time the cause of action accrues. If the statute once begins to run against a party, it so continues until the bar is complete. No subsequent disability, not even insanity, will impede it.

Same—Findings.

Held, that the finding of the trial court to the effect that when plaintiff's grantor entered into the adverse possession of the land here in question the owner thereof was not then insane is sustained by the evidence.

Appeal by defendant from a judgment of the district court for Stearns county, in favor of plaintiff, entered in pursuance of the findings and order of Searle, J. Affirmed.

Calhoun & Bennett, for appellant.

Geo. H. Reynolds, for respondent.

START, C. J. This is an action to recover the possession of 80 acres of land. The plaintiff had judgment, and the defendant appeals therefrom.

It is undisputed that Mrs. Rebecca S. Parks died intestate, seised in fee of the land, October 16, 1866, leaving, her surviving, her husband, who died some time prior to July 23, 1895, but when the record does not show; also two children,—Catherine Parks, who died in 1893, and prior to November 10, and Lulu C. Parks. The latter, on the day last named, executed a quitclaim deed of the land to George Botham, and the latter, on December 26, 1893, executed a like deed of the land to the defendant, who is in possession thereun-

[1] Reported in 69 N. W. 812.

der. William Kruger was in the open, adverse, and notorious possession of the land from 1877 to 1893, under color and claim of title thereto. The plaintiff, before the commencement of this action, succeeded to the title of Kruger in and to the land by virtue of a foreclosure sale thereof upon a mortgage thereon executed by Kruger June 1, 1891, while he was so in possession of the land.

It is conceded upon these facts by the defendant that, if Laws 1889, c. 91, reducing the time within which an action for the recovery of land may be brought from 20 to 15 years, is constitutional, and if Catherine Parks was not insane within the meaning of G. S. 1894, § 5147, the plaintiff is the owner of the land. But the defendant claims that chapter 91 is not constitutional, and that Catherine Parks was insane.

1. The first claim of the defendant is that this act of 1889 never became a law, because it was not passed by the legislature in accordance with the requirements of section 13, art. 4, of the constitution, which provides that:

"No law shall be passed unless voted for by a majority of all of the members elected to each branch of the legislature and the vote entered upon the journal of each house."

We had this precise question before us in the recent case of Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632, in which we held that the act was constitutionally enacted. We adhere to that decision. The reasons here urged why we should overrule the decision were fully considered by the court in the Miesen case, although not all of them were referred to in the opinion.

2. The defendant's second claim is that, by reason of the insanity of Catherine Parks, the statute did not run as to her. The exception to the statute relied on by the defendant is G. S. 1894, § 5147, which, so far as here material, reads thus:

"If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, is, at the time the cause of action accrued * * * insane: * * * The time of such disability is not a part of the time limited for the commencement of the action."

The disability which, by virtue of this statute, will arrest the running of the statute of limitations, must exist at the time the cause of action accrued. If the statute once begins to run against a party, it continues to run until the bar is complete. No subsequent dis-

ability, not even insanity, will impede it. Angell, Lim. § 196; 2 Wood, Lim. 578; Moore v. Armstrong, 36 Am. Dec. 63, 77; Lincoln v. Norton, 36 Vt. 679; Clark's Exr. v. Trail's Admrs., 1 Metc. (Ky.) 35; Allis v. Moore, 2 Allen, 306. In the last case cited it was held that, if the owner of land has been disseised, his subsequent insanity does not prevent the disseisor's title ripening by adverse possession. It was, therefore, incumbent on the defendant in the case at bar to show that at the time Kruger entered into the adverse possession of the land under a claim of title hostile to that of Catherine Parks she was insane. Such entry was made in the year 1877, and the trial court in effect found that Catherine Parks was not insane at that time.

The defendant asserts that the undisputed evidence shows that she was insane from the time she was three years old; hence the finding of the trial court is so palpably against the weight of the evidence that it should be set aside. The claim is not justified by the evidence, which was not such as to require the court to find that the insanity of Catherine Parks existed at the time Kruger went into possession of the land, in 1877.

The only testimony on this point was that of the sister and uncle by marriage of Catherine Parks, given in the form of depositions. Neither of them states the time when Catherine became mentally incapable of caring for herself or transacting any business. The sister testified that for a long number of years Catherine was an inmate of an institution for the feeble-minded, and she there visited her; but the witness fails to state when Catherine was in the institution.

The only suggestion that Catherine was of unsound mind from her third year is found in the questions to the witnesses, not in their answers. Take one question and answer as an illustration:

"Q. State what has been her mental condition since her third year, or such part of the time as you may have knowledge. State fully. A. She was of unsound mental condition."

When was she in that condition? From her third year, or during the time the witness had knowledge of her mental condition? The testimony of the uncle is to the effect that he lived in the same town with Catherine for 10 or 12 years, and saw her almost daily, and that during this time she was incapable of taking care of her-

self; but the witness failed to state when it was that he lived near to and knew her. Neither of the witnesses stated any fact as to her mental condition from which the trial court was bound to or reasonably might have inferred that she was non compos from her third year, or at any time prior to the date of Kruger's entry upon her land. The finding in question is sustained by the evidence.

Judgment affirmed.

FRED H. STOLZE v. BANK OF MINNESOTA.[1]

January 14, 1897.

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Nos. 10,193—(201).

Bank—Discount of Note—Effect.

Held, following Becker's Inv. Ag. v. Rea, 63 Minn. 459, that whether the discounting of a bill or note with the general indorsement of the holder is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact.

General Deposit—Equitable Set-Off.

The plaintiff's assignor indorsed and delivered certain notes of its customers to the defendant, and was credited on the books of the defendant with the amount thereof as a general deposit. The assignor thereafter made an assignment for the benefit of its creditors to the plaintiff, who brought this action to recover the balance of the deposit. The trial court found as a fact that the transaction was a loan, secured by the indorsed notes, and as a conclusion of law that the defendant had the right to an equitable set-off of the loan against the deposit, although the loan was not due when the assignment was made. *Held*, that the evidence sustains the findings of fact, and that the conclusion of law is right.

Appeal by plaintiff from a judgment of the district court for Ramsey county, in favor of defendant, entered in pursuance of the findings and order of Kelly, J. Affirmed.

Samuel Morrison and *P. J. McLaughlin*, for appellant.

Stevens, O'Brien, Cole & Albrecht, for respondent.

[1] Reported in 69 N. W. 813.

START, C. J. This is an action by Fred H. Stolze, as assignee of the Elmer H. Dearth Agency, an insolvent corporation, to recover from the defendant $2,838.83, the balance of a general deposit with the defendant to the credit of the insolvent at the date of its assignment to the plaintiff for the benefit of its creditors. The answer admits the amount of the deposit, and alleges as an offset that the defendant loaned and advanced to the insolvent, at its request, before its assignment, various sums of money, amounting, in the aggregate, to $9,869.17, and took as security therefor certain negotiable promissory notes, set out in the answer, payable to and indorsed by the insolvent. The reply denied that the defendant loaned any money to the insolvent, and alleged that the notes referred to in the answer were sold and indorsed to the defendant, and that none of them were due at the time the insolvent made its assignment. Upon this issue the trial court made this finding:

"The defendant at various times granted loans of money and accommodations to the said Elmer H. Dearth Agency, and at its request, and accepted its indorsements upon negotiable paper of others as security for said loans. Among other transactions, the said defendant advanced, loaned, and paid out to the Elmer H. Dearth Agency, aforesaid, and at its request, and before its said assignment, various sums of money, amounting in the aggregate to $9,869.17, and took as security for said loans the indorsement of the said Elmer H. Dearth Agency upon certain notes, mentioned in defendant's answer, all of which are now overdue and none of which have been paid, except a note of D. Kennedy & Son for the sum of $143.44, and except that there has been paid upon certain notes of Hobb's Medicine Company the sum of $5,000, and there still remains unpaid upon said loans far more than the amount of said deposit. The makers of all said notes were insolvent at the time of the making of the assignment of the Elmer H. Dearth Agency, and still remain insolvent. Due demand of payment and notice of nonpayment and protest for nonpayment of said notes was made at their maturity."

It was admitted, as a fact, on the trial, that none of the notes referred to in the answer and findings were due when the assignment was made. As a conclusion of law, the court directed that the plaintiff take nothing by this action, and that defendant have judgment for its costs. The plaintiff appealed from the judgment so entered.

The only question on this appeal is the sufficiency of the evidence to support the foregoing finding of fact.

If, as claimed by the plaintiff, the only liability of the insolvent, the Dearth Agency, to the bank was that of indorser on the notes referred to, then his contention to the effect that such liability was contingent, because, when the assignment was made, the notes were not then due, and therefore such liability cannot be offset in this action, is correct. Wilder v. Peabody, 37 Minn. 248, 33 N. W. 852. The plaintiff's claim rests upon the proposition that the indorsement of the notes to the defendant was an absolute sale of them, and that the bank did not loan to the insolvent any money. On the other hand, the claim of the defendant is that the insolvent's liability was twofold: (1) That it was primarily and absolutely liable to the bank for the amounts represented by the several notes, because such amounts were loaned to the insolvent on the notes so indorsed as security; (2) that it is contingently liable as such indorser; (3) that it is the absolute debt or liability, and not the contingent one, which the bank seeks to offset in this case.

If the defendant's claim is correct, it follows that the conclusion of law by the trial court is also correct; for, if the claim of the bank was absolute, although not due, it had the right to an equitable set-off in its favor against the deposit, upon the insolvency of the Dearth Agency. St. Paul & M. T. Co. v. Leck, 57 Minn. 87, 58 N. W. 826. The pivotal question in the case, then, is, did the defendant loan the amount of the several notes to the insolvent on the security of its general indorsement of the notes? It is admitted that the defendant did not take any note or obligation from the insolvent as evidence of the alleged loan, and that, when the insolvent brought in the notes, with its indorsement thereon, and delivered them to the defendant, the amount thereof was placed to its credit, and was subject to its check. Whether or not the discounting of a bill or note, with the general indorsement of the holder, is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact. Becker's Inv. Ag. v. Rea, 63 Minn. 459, 65 N. W. 928.

The evidence sustains the finding of the court we have quoted, to the effect that the defendant loaned the amount of the notes

to the insolvent, and took the notes as collateral. There were two principal witnesses on this question,—Mr. William Dawson, Jr., the cashier of the defendant, and Mr. Elmer H. Dearth, the president of the insolvent. The testimony of the former was substantially this:

A day or two before October 1, 1895, Mr. Dearth came into the bank, and said that he had a good concern that was entitled to credit, and wanted to do business with a bank that would do it on the basis of their own credit; that they would keep a good balance, and would at times want to borrow as high as $20,000. I told him to bring in a statement, and if it was all right we would take the account and make the loan. He brought in the statement, showing the company to be solvent. The next day he came in, and I took some notes from him, and I loaned him $2,913.29. After this I did not see very much of him. The business went right along. He said he would not ask to borrow on his or his company's name, but always on his customer's paper. These notes were brought in, and we would loan him the money, and place it to his credit just as fast as he brought them in, up to twelve or thirteen thousand dollars. Some of them were taken care of when due by the makers, and others by the Dearth Agency.

On his cross-examination he testified as follows:

"Q. Is it your usual custom, Mr. Dawson, when you make a loan, or make a loan to a customer or anybody else, to make the loan without taking from the borrower his note? A. Why, we have got a lot of customers, just like Mr. Dearth, that we take the paper, and charge it to them. Q. But I ask you, when you say that is the custom, what is the usual custom, in relation to taking the note of the debtor? Don't you require the debtor to make his note when you make a loan of money to him? A. Why, if we loan it to him on his own name, we take his note. If we loan it on stocks or bonds or collateral, we take his note, and state what the collateral is. If we loan him on his customer's note, we take the note, and don't take his with it. Q. Now, if he came in to discount a note, without asking you to discount a loan at all, you would do precisely the same thing, wouldn't you? A. I don't think they very often say, 'Will you discount a note?' They say, 'Will you loan us some money on this note?' That is the way they usually come in. Q. Now, Mr. Dawson, do you mean to say that, where a party should come in with notes that he wanted discounted, and he said he wanted you to make a loan, that you wouldn't also take his note? A. I mean to say, if we were going to loan him any money, we would simply have him write his name on the notes, and place them to his credit. * * * Q. Do you mean to testify, Mr. Dawson, that you held those notes, and all the notes that you had at that time, as collateral to loans or advances that you had made from time to time to the Dearth Agency? A. I mean they were collaterals to the indorsement of Mr. Dearth's company to our bank. Q. As what? A.

They were the only security we had for the advances made by our bank to Mr. Dearth on those notes."

The cashier gave much other testimony, but none which materially affects that which we have here set out. The president of the insolvent testified that he told the cashier that his company wanted a line of credit in discounting the paper of its customers, and that it might run as high as $15,000 or $20,000.

"Q. Was anything said about borrowing or loaning money? A. No; only in that connection. Q. Did you ever ask a loan from the bank? A. No. Q. Did they ever loan you any money? A. No; only in that connection as I stated. Q. Do you know how the business was transacted in relation to the discounting of the paper between you and the bank? A. Yes. Q. What was the method? A. Why, we took our customers' paper, notes bearing interest, there for deposit to our credit, discounted. Q. You took the notes to the bank? The note was indorsed by you,—by the Dearth Agency? A. By the Agency. Q. Delivered to the bank, and your account was credited? A. Yes, sir."

It is obvious that the evidence amply sustains the finding. Such being the case, all other questions urged by the appellant are immaterial.

Judgment affirmed.

STATE OF MINNESOTA v. CHARLES T. GOODRICH and Another.[1]

67 176
80 253

January 14, 1897.

Nos. 10,215–10,216—(58–59).

Selection of Grand Jury—Washington County—Validity.

The defendants moved to quash the indictments herein on the grounds (1) that the jury list, from which the grand jury returning the indictments were drawn, was not made by the board authorized to make the same; (2) that such jury list was not made as required by the Washington county jury law (G. S. 1894, §§ 5629–5633); (3) that the grand jury was illegally reconvened for an adjourned term of court at which the indictments were returned. *Held*, that the trial court rightly denied the motion to quash.

[1] Reported in 69 N. W. 815.

Forgery—Indictment.

The uttering of a false or forged instrument, and the making of such instrument, are distinct offenses; and an indictment for the former need not set out who made the false instrument, or how it was made, or the intent of the maker.

Same—G. S. 1894, §§ 6696, 6702.

G. S. 1894, § 6696, makes it forgery in the third degree for a person to make false entries, with intent to defraud, in accounts or books which he is employed to keep; and knowingly uttering such false entries with such intent is also made forgery in the same degree by section 6702.

Same—Public Offense.

The indictments herein, purporting to charge the defendants with uttering as true certain false entries in an account of a survey of logs, considered, and *held* to state facts constituting a public offense.

Indictments in the district court for Washington county against Charles T. Goodrich and James Matthews and against Charles T. Goodrich and Joseph Crick. In each case orders were made, Williston, J., denying a motion to dismiss and set aside the indictment and overruling a demurrer to the indictment, and the case was certified to the supreme court for its decision upon the questions arising on the motion and demurrer. Affirmed.

H. W. Childs, Attorney General, and *L. L. Manwaring*, County Attorney, for the State.

J. N. Castle and *Smith & Parsons*, for defendants.

START, C. J. These cases were certified to this court by the district court of Washington county pursuant to G. S. 1894, § 7395. The questions certified for our decision are identical in each case. They are: (1) Did the trial court err in denying the defendants' motion to quash the indictments? (2) Did it err in overruling defendants' demurrer to the indictments? We answer each of the questions in the negative.

1. The defendants' motion to quash was based on two general propositions: (a) That the grand jury list was illegally selected; (b) that the grand jury was illegally reconvened for an adjourned term of court, at which the indictments were returned.

The defendants claim that the list from which the grand jury returning the indictments were selected was not made by the board

authorized to make the same, for the alleged reason that the judge was not present when the jury list in question was made.

The method of selecting jurors in the county of Washington is prescribed by special law (G. S. 1894, §§ 5629–5633), which directs that the acting judge of the district court, the clerk thereof, the county auditor, and the chairman of the board of county commissioners shall constitute a board, whose duty it is to make up the jury list for the county. The judge is the chairman of the board, and the clerk of the court is the clerk thereof, and no meeting of the board can be held or business transacted in the absence of the chairman. The findings of fact, on the motion to quash, certified to by the trial court, are, so far as here material, as follows:

The court took such evidence, parol and of record, as the parties offered, and the facts involved in the motions, as found, are that on August 30, 1883, the first jury lists were selected under the special law. "From that date unto the 24th day of August, 1891, there was, during each term of court, selected and added to such list such number of names as were required to make the number of names on the grand jury list equal to the number originally on the list selected August 30, 1883, viz. seventy-two. On August 24, 1891, an entire new selection of seventy-two names was made, which list has been subsequently filled in the same manner as before, and in the manner provided in the act, as such act was evidently construed by the judge who first construed the said act; the last selection of names having been made March 26, 1895, when was prepared a list containing seventy-two names duly certified to by the judge presiding and the clerk. On the hearing of said motion no claim was made that any member of the grand jury in question was in any manner disqualified in acting as a grand juror, or that, as to these defendants, any cause of challenge existed as to any of said jurors."

It is to be noted that the trial court did not find that the acting judge of the district court was not present at the meeting of the board at which the jury list in question was made. On the contrary, the finding is that the list was duly certified by the judge presiding and the clerk. Hence, there is no basis of fact in the certificate for the claim of the defendants that the list was not made by the board authorized to make it because the judge was not present at the meeting at which the list was made. But the defendants urge that such fact appears from the testimony of the clerk taken on the hearing of the motion. This testimony is certified by the trial judge in these words:

"The above and foregoing testimony is by consent of counsel of both parties hereby made a part of the original certificate now on file in the supreme court in the above-entitled action, and is the testimony taken by me in said action on the motion to quash the indictments referred to in said certificate."

It does not appear, from this certificate, that this was all of the evidence upon which the trial court based its findings. But, waiving this point, and treating the testimony as a part of the certificate, still there is no proof of the alleged fact upon which the defendants' claim is based; for the testimony of the clerk tends to support the findings and conclusions of the trial court. The clerk testified that the judge was always present when the board met in the clerk's office, and then, after directing that the lists be prepared, he would go into the court room, and hold court, while the other members prepared the lists, but there was no adjournment until he returned, and he was always present before the work was completed, and approved and signed the list. This shows a substantial compliance with the law.

The defendants also claim that the list from which the grand jury returning the indictments was drawn was not legally made for the further reason that an entirely new list was not made at the first term of the judicial year in which the grand jury in question was drawn. Section 2 of the Washington county jury law (G. S. 1894, § 5630) requires a list of 72 persons qualified to serve as grand jurors to be made at the first general term of the court held in each year; that no person shall be included in such list who was included in the last previous annual list, and was drawn and served as a juror from the same; that all persons having served for one term shall be retired from such list, and shall not again be drawn for one year; and that

"During each term of court the clerk shall notify the board of the persons serving upon the panel for said term, and thereupon said board shall supply the names of persons qualified as hereinbefore provided, sufficient to make the number of names on said list equal to the number originally thereon, and said names when so supplied shall be added to the original list, and immediately after the term the clerk shall strike from the original list the names of all persons who have served as jurors during said term, or have been found disqualified for such service."

It is apparent, from these provisions, that it is only persons who were actually drawn from the list, and served as jurors, that cannot be included in the new list, and that, when the names of all persons who so served, or who were found disqualified, are struck from the original list, the names remaining on such list may be placed on the new list, and only a sufficient number of new names selected to make up the required number of 72. The practice, as shown by the findings of the trial court, from the time the law took effect, was to add each term enough new names to the original list to make, with the qualified persons remaining, the required number, so that at all times the jury were drawn from a list containing the names of 72 qualified persons. This, for all practical purposes, was a new list, and a substantial compliance with the law. It is difficult to see how the requirement that the list shall be purged and filled at each term of court can be complied with except by following the method adopted by the district court.

The last ground upon which the motion to quash was based is that the grand jury was discharged, and could not be legally reconvened at an adjourned term. The facts found by the trial court dispose of this claim.

The grand jury were duly impaneled at the commencement of the May term, 1895, and entered upon the discharge of their duties, and, having reported to the court that they had considered all matters presented to them, the court did not discharge them, but simply excused them from further attendance upon the court, unless their further attendance should be thereafter required, of which notice would be given them. Subsequently, by order of court, they were required to return at an adjourned term on June 26, 1895, and a copy of such order was served on them. In response to the order 20 members of the grand jury reported. They were instructed by the court, and afterwards the grand jury returned the indictments against the defendants. The action taken by the trial court was authorized by the statute, which provides that, on the completion of the business before the grand jury, they shall be discharged by the court, or the court may, in its discretion, adjourn their session from time to time during the same term; but, whether the business is completed or not, they are discharged by a final

adjournment of the court. G. S. 1894, § 7201. The trial court correctly denied the motion to quash the indictments.

2. The defendants demurred to the indictments on the ground that they do not state facts sufficient to constitute a public offense. The indictments purport to charge the defendants with forgery in the third degree; that is, with uttering and publishing as true a false entry in an account of a survey of logs, commonly known as a "tally card," with intent to defraud. The first objection made to the indictments, in support of the demurrers, is that there is no direct allegation that the entry was forged; that is, as defendants say in their brief:

"The pleader, instead of alleging directly that it was forged, has set up particular facts and circumstances, intending to show that this false entry was a forgery within the meaning of section 402, Penal Code. These indictments fail to show that this entry was forged within the meaning of that section—First, because there is no allegation of intent to defraud alleged as of the time of making the entry; and, second, because section 402 [2] does not make it a crime for a person to make a false entry in his own memorandum or book, or memoranda of books, or in those which he is employed to keep."

If we understand this claim, it is that an indictment for uttering a false instrument must allege that it was forged with the intent to defraud formed at the time it was made. But the uttering of a false or forged instrument, and the making of such instrument, are distinct offenses, and an indictment for the former need not set out who made the false instrument, or how it was done, or his intent in making it; for the gist of the offense of uttering a false instrument is that the defendant, knowing it to be false, uttered it as true, with intent to defraud. State v. Wood, 13 Minn. 112 (121); Lockard v. Com., 87 Ky. 201, 8 S. W. 266. The false entry charged to have been uttered by the defendants in the case at bar was not forged, in the sense that it was made by a person not authorized to make it, but it was falsely made, by the person who was charged with the duty of keeping a correct account of the survey of the logs, by inserting in the account logs which had no existence; hence, it was properly charged as a false entry.

The further claim of defendants, that it is not a crime for a person to make a false entry in accounts or books he is employed to

[2] G. S. 1894, § 6696.

keep, and therefore the uttering of such false entry is not a crime, is answered adversely to them by the statute (G. S. 1894, § 6696; Pen. Code, § 402), which provides that:

"A person who, with intent to defraud * * * (1) alters, erases, * * * an account, book of accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or (2) makes a false entry in any such account, or book of accounts, * * * is guilty of forgery in the third degree."

The indictments in this case are for uttering a false entry in a survey account, the making of which is, by subsection 2 of section 6696, G. S. 1894, forgery in the third degree. The uttering of such false entry constitutes forgery in the same degree as the making of it. G. S. 1894, § 6702 (Pen. Code, § 408). The provisions of the statute we have quoted include false entries, made with intent to defraud, by a person, in accounts or books he is employed to keep. This construction does not, as urged by defendants' counsel, render nugatory subsection 1 of section 6695, G. S. 1894 (Pen. Code, § 401).

It is also claimed that the indictments are defective because the false entry is not set out therein in hæc verba. It may be conceded that indictments for forgery and uttering forged instruments must set out the instrument in hæc verba. The indictments, however, in this case purport on their face to comply with this rule, and the objection that they do not cannot, therefore, be raised by demurrer. There are some general allegations in the indictments which might, standing alone, indicate, as claimed by defendants, that the whole of the false entry was not set out, but the allegation of the indictments in this respect is as follows:

"Which said false and forged entry in said pass book, or so-called tally-card, was in characters and figures as follows."

Then follows what purports to be the whole of the false entry.

The next objection to the indictments is that they do not show on their face that any person could be defrauded by uttering the false entry. Where an intent to defraud is required in order to constitute a crime, a general allegation of such intent is sufficient in the indictment, without naming the party defrauded. G. S. 1894, §§ 6842, subd. 5, 6845; State v. Adamson, 43 Minn. 196, 45 N. W.

152. The statute, however, does not change the common-law rule that, if it does not appear on the face of the instrument forged or uttered, that some one might be defrauded by it, extrinsic facts must be alleged in the indictment showing that some person could be defrauded by it. State v. Wheeler, 19 Minn. 70 (98); State v. Riebe, 27 Minn. 315, 7 N. W. 262.

The false entry set out in the indictments does not show on its face that any person might be defrauded by acting upon it as true. But extrinsic facts are alleged in the indictments which, when taken in connection with the general laws of the state relating to the duties of the surveyor general of logs and lumber, make it perfectly manifest that any person relying on the false entry would be defrauded. The indictments allege the manner of doing business in the surveyor general's office, and show on their face that the defendant Goodrich was employed to assist a deputy surveyor in making a survey of logs; that he was to make the entries (in a pass book, or tally card, so called) of the number of the logs, their marks, and the number of feet therein, as surveyed by such deputy; that the tally cards were returned into the office of the surveyor, and were made the basis for making out true and correct scale bills. Such scale bills are made by statute prima facie evidence of the facts stated therein. It follows that, if false entries are made in the tally cards, the scale bills will also be false, and persons relying thereon will necessarily be defrauded.

The last objection to the indictments is that they are uncertain as to the subject-matter of the uttering, in that it does not appear that the pass book or tally card belonged to or appertained to the office of the surveyor general at the time the false entry was made. A reading of the indictments is a sufficient answer to this objection. They allege that the pass book, when uttered, constituted an account in the surveyor general's office, and purported to contain entries by the defendant Goodrich as an employé of the surveyor general.

The trial court rightly denied the motion to quash the indictments, and overruled the demurrers thereto.

Orders affirmed.

MOSES STEWART v. EGBERT COWLES and Others.[1]

January 14, 1897.

Nos. 10,228—(177).

Authority of Agent—Sale of Business Chattels—Evidence.

It is not within the apparent authority of a general agent, having the entire management of his principal's business, to bind him by a contract for the sale of chattels belonging to such business, to be paid for by credit of the purchase price upon an indebtedness due from the agent to the purchaser. The burden is upon the purchaser to show that the agent had such authority. But where there is no question as to the good faith of either the agent or purchaser, and both the agent and principal are dead at the time of the trial, any circumstantial evidence fairly tending to establish the agent's authority is sufficient to make a prima facie case.

Same.

Evidence *held* in this case sufficient to establish the authority of an agent to sell the goods of his principal in payment of the agent's debt.

Appeal by defendants from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

Booth & Douglas, for appellants.

O. W. Baldwin, for respondent.

START, C. J. The undisputed evidence in this case established the following facts: Henry B. Morrison, the son of the original defendant herein, Francis Morrison, now deceased, prior to the year 1884, carried on a general lumber and brick business at Motley, this state. His mill at which the lumber was manufactured was on his homestead. In October, 1884, he made an assignment, for the benefit of his creditors, of all of his unexempt property. At the time of his assignment he was indebted to the plaintiff herein in the sum of about $4,500, which indebtedness was secured by a bill of sale from Henry B. Morrison to the plaintiff of 600,000 brick which were marked with the plaintiff's name on the kilns. The father, Francis Morrison, purchased from the assignee prac-

[1] Reported in 69 N. W. 694.

tically all of the assets of Henry coming to the hands of the assignee, and thereafter carried on, in his own name, the same business as his son had previously carried on, and at the same place. The father gave no personal attention to the business, but his son Henry was his general agent, and conducted the business the same as he had done before his assignment, except that everything relating to the business was done in his father's name.

While he was so conducting this business for his father, Henry applied to the plaintiff for a loan of $2,500 to be used in the business, and it was then agreed between him, as such agent, and the plaintiff, that the plaintiff should make to the father the desired loan, and that enough brick and lumber should be delivered to the plaintiff by the father to pay the debt due from Henry to the plaintiff which existed at the time of the assignment. There is no evidence showing that the father had any knowledge of the making of this contract. Thereupon the plaintiff advanced the amount of the proposed loan, which was used in the father's business, and lumber and brick of the value of $3,096.90, from the stock belonging to the father, were delivered to the plaintiff by Henry acting as such general agent, which amount was credited on the claim due from Henry to plaintiff.

This action was brought by the plaintiff to recover the balance of the loan so made to Francis Morrison, which is admitted to be $2,211 and interest. The defendant set up, by way of counterclaim, the value of the lumber and brick, $3,096.90, so delivered to the plaintiff. At the time of the trial both Henry B. and Francis Morrison were dead, and the executors of the latter were substituted as defendants. The plaintiff had a verdict for the amount of his claim, and the defendants appealed from an order denying their motion for a new trial. The evidence to prove the foregoing facts and other facts hereinafter referred to was duly objected to and received over the objections and exceptions of the defendants. The admission of this evidence is assigned as error by the defendants. They further assign as error that the verdict is not justified by the evidence.

While the assignments of error are numerous, there is but one question in this case: Is the evidence sufficient to show, prima facie, the authority of the son to make this contract on behalf of

his father, and apply the lumber and brick in question in payment of his then-existing indebtedness to the plaintiff? Although the son was the general agent of his father in the management of the business, yet the appropriation of his principal's property to the payment of his own debt was not within the scope of his apparent authority, and the burden was on the plaintiff to show that in fact he had such authority. Talboys v. Boston, 46 Minn. 144, 48 N. W. 688.

But the plaintiff was not bound to prove such authority by direct evidence. Both the father and son being dead, the statute sealed the plaintiff's lips as to any conversation he may have had with either of them, and he was deprived by death of the opportunity of calling them as witnesses on the question of the son's authority. He therefore had no other way to prove such authority except by the admissions of the father and by circumstantial evidence. It was competent for him to prove such authority by such evidence. Freeman v. Lawton, 58 Minn. 546, 60 N. W. 667. There is no question as to the good faith either of the agent or of the plaintiff in making the contract. In view of the admitted special circumstances of this case, any evidence fairly tending to show the son's authority must be held to be sufficient to make a prima facie case, and cast the burden upon the defendants to rebut it.

The facts and circumstances disclosed by the evidence which tend to establish the son's authority in the premises may be briefly summarized as follows: The relationship of the principal and agent was that of father and son. The business conducted in the father's name was the identical business owned and carried on by the son before his assignment, and he continued to carry it on precisely as before, except it was as agent for his father. He bought logs, sold lumber and brick, received payment therefor, gave notes, drew checks, borrowed money, and paid debts, all in his father's name. The mill and lumber yard used for the purpose of conducting the father's business were a part of the homestead of the son, and the brick yard, estimated to be of the value of $27,000, was conveyed by the son, through a third party, to his father, without consideration. About the time, or soon after, the son began to run the business in his father's name and for him, the latter stated that he was going into the business in his own name for

the purpose of assisting his son in getting his old matters settled up,—to get his boy on his feet again.

While the son was conducting the business for his father, but some three months after the making of the contract in question with the plaintiff, he settled a claim of $1,600 against himself personally, which was contracted before his assignment, by giving his father's notes therefor, signing his father's name to the notes as agent. This was done in the father's presence, and when the payee of the notes said to the father, "He seems to use your name pretty freely," the reply was: "He does, and it is all right. Henry is my agent for all matters up the river, and I hope he will get on his feet again. With my help he will;" and, further, that Henry was going ahead to straighten up his business, and pay his old bills.

The brick of which the plaintiff had a bill of sale were shipped by the son to the father after the making of the contract with the plaintiff. The defendants offered no evidence on the question of the son's authority. The question is not whether each of these facts, considered alone, establishes, prima facie, the authority of the son to make the contract with the plaintiff, but whether, when they are considered as a whole, they are sufficient to support a finding by the jury that the son was so authorized.

Our conclusion is that the evidence of these facts, unexplained and uncontradicted, was sufficient to make the question of the son's authority one for the jury, and that the verdict is justified by the evidence.

Order affirmed.

ALBERT E. CARPENTER v. EASTERN RAILWAY COMPANY OF MINNESOTA.[1]

January 14, 1897.

Nos. 10,275—(189).

Assignments of Error—Amendment.

An appellant has no right to amend his assignments of error after the time for serving them has passed, except by consent of the respondent or by leave of court. Greene v. Dwyer, 33 Minn. 403, followed.

Same—Sufficiency.

An assignment of error, "that the court erred in its instructions to the jury, to which the defendant excepted," also one "that the court erred in refusing the instructions requested by the defendant," where there were several exceptions and requests, are each too general to be available.

Carrier—Live Stock—Notice of Injury.

Held, following Engesether v. Great Northern R. Co., 65 Minn. 168, that a provision in a stock-shipping contract which requires the owner of the stock, as a condition precedent to his right to recover for any loss or injury to his stock, to give notice in writing of his claim to some officer of the carrier before the stock is removed from the place of its destination or delivery, is unreasonable and void, where the carrier has no officer or agent at such place.

Verdict—Evidence.

Held, that the verdict in this case is justified by the evidence.

Appeal by defendant from an order of the municipal court of Duluth, Boyle, J., denying a motion for a new trial. Affirmed.

C. Wellington and *J. A. Murphy*, for appellant.

McGindley & Whitely, for respondent.

START, C. J. The plaintiff, on August 2, 1894, at Duluth in this state, delivered to the defendant 10 horses, to be transported to Minto, N. D., pursuant to a stock-shipping contract, similar to the contract considered by this court in the case of Engesether v. Great Northern R. Co., 65 Minn. 168, 68 N. W. 4. This action was brought to recover damages for injuries to the horses caused by the negligence of the defendant in unreasonably delaying the transportation

[1] Reported in 69 N. W. 720.

of the horses and in the unnecessarily violent handling of the train on which they were carried. Verdict for the plaintiff for the sum of $355. The defendant appealed from an order denying its motion for a new trial.

The defendant, in its original brief, assigned seven errors; but, after the time for serving its brief had passed, and only five days before the day set for the hearing of the case, it made and served a further brief, in which 37 errors were assigned, which the plaintiff refused to receive, and returned. The plaintiff claims that the additional and amended assignments of error must be disregarded, and the appeal decided on the original assignments. The claim is right, and is allowed. An appellant has no right to amend or add to his assignments of error after the time for serving them has passed, except by consent of the respondent or by leave of court. Greene v. Dwyer, 33 Minn. 403, 23 N. W. 546.

The first claim made by the defendant in its brief is that the damages are excessive. We cannot consider the claim, for there is no assignment of error sufficiently specific to raise the question. The motion for a new trial herein was based upon five distinct grounds, one of which was that the damages were excessive; but the assignment of error is, simply, that the court erred in not granting defendant's motion for a new trial. Wilson v. Minnesota F. M. F. I. A., 36 Minn. 112, 30 N. W. 401.

The defendant took 14 exceptions to the charge of the trial court, some of which clearly were without merit, and assigns as error "that the court erred in its instructions to the jury, to which defendant duly excepted." This is not sufficiently specific to permit us to consider any of the alleged errors in the instructions. The defendant also submitted ten separate requests for instruction, some of which were erroneous. The court refused all of them, and the defendant assigns as error "that the court erred in refusing to give the instructions requested by defendant." This is too general. It specifies no particular request which it was error to refuse. In the case of Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594, the test as to the sufficiency of assignments of error was stated in these words:

"An assignment so general and indefinite as not to indicate the specific error asserted would be a mere evasion of the rule; while,

on the other hand, the practice of multiplying assignments by a repetition and unnecessary subdivision is a perversion of the rule, which defeats the very purposes for which it was adopted."

A disregard of this rule is becoming chronic, and we again call attention to it, in the hope that it may be observed, and that assignments will no longer be either so general as to mean nothing, or so multiplied, divided, and refined as to increase, instead of lessening, the labor of the court in ascertaining and passing upon the specific alleged errors actually relied upon.

The defendant requested that certain special questions of fact should be submitted to and answered by the jury. The trial court refused, and such ruling is assigned as error. This was a matter within the discretion of the trial court, and there was no abuse of its discretion.

The trial court denied the defendant's motion for a nonsuit, and also refused its request to instruct the jury to return a verdict for the defendant. These rulings are properly assigned as error, and two general reasons are urged why the trial court erred in respect to them.

1. The first is that the evidence was not sufficient to justify a finding by the jury that the defendant was guilty of any negligence in the premises, but that it required a finding that the plaintiff was guilty of contributory negligence. We have considered the evidence, and find it ample to sustain a finding that the defendant was negligent. The defendant, however, claims that the plaintiff failed to exercise proper care in feeding, watering, and caring for his horses while they were being transported, and that such neglect contributed directly to the sickness and injury of his horses complained of. The verdict is not so manifestly against the weight of the evidence on this point as to justify us in interfering with it, and our conclusion is that the question of the plaintiff's contributory negligence in the premises, as well as that of the defendant's negligence, was, under the evidence, a question of fact, for the jury.

2. The second ground urged why the defendant was entitled to a verdict is that the plaintiff did not offer any competent evidence to show that he gave notice in writing of his claim on account of injuries to his horses to the nearest station agent or some officer of the defendant, before the horses were moved from their place of

destination, and before they were mingled with other stock, as provided by the shipping contract. The defendant's contract with the plaintiff was to transport his horses to Minto, N. D., a point several hundred miles beyond its line of railway, and there is no claim made by the defendant that it there had, at the place of destination or delivery, any agent or officer upon whom service of such notice could be made; hence, the provision of the contract here in question was unreasonable and void. In this respect this case is ruled by that of Engesether v. Great Northern R. Co., 65 Minn. 168, 68 N. W. 4.

Order affirmed.

PABST BREWING COMPANY v. W. W. BUTCHART, Sheriff.[1]

67	191
68	294
s68	303
67	191
81	109

January 15, 1897.

Nos. 10,205—(210).

Fraudulent Conveyance—Chattel Mortgage.

A chattel mortgage on a retail stock of goods provided that the mortgagor should sell the goods in the regular course of business, and apply the proceeds in keeping up the stock and defraying the expenses of running the business, and that all of the balance of the proceeds should be paid to the mortgagee, to be applied on the mortgage indebtedness. *Held*, the mortgage was, on its face, fraudulent and void as to the creditors of the mortgagor.

Appeal by plaintiff from an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial. Affirmed.

McGindley & Whitely, for appellant.

Wilson & Wray, for respondent.

CANTY, J. Under an execution issued on a judgment against one Wagner, the defendant, as sheriff of St. Louis county, levied on certain liquors the property of Wagner. Plaintiff brought replevin, claiming the property under a chattel mortgage made and delivered to it by Wagner, and filed of record prior to such levy. On the

[1] Reported in 69 N. W. 809.

trial, the court held plaintiff's chattel mortgage void on its face as to the creditors of Wagner, and dismissed the action. Plaintiff appeals from an order denying its motion for a new trial.

The only question raised on this appeal is whether, as to the creditors of Wagner, the chattel mortgage is void on its face; and we are of the opinion that it is. It is the same chattel mortgage considered in the case of Pierce v. Wagner, 64 Minn. 265, 66 N. W. 977, 67 N. W. 537. But in that case the question here presented was not decided, as there was oral evidence tending to prove, as the court below decided, that the mortgage was, as to creditors, void in fact, and the decision was affirmed. The mortgage recites that it covers a stock of liquors and cigars, "being used and sold by the party of the first part at retail in the carrying on and conducting of a saloon." It further recites that the stock which it so covers is of the value of $1,500, and it provides that said stock shall, until the mortgage debt is paid, be kept up to that value by purchases from time to time by the mortgagor; that the proceeds of sales in the business shall be used to keep up the stock; that the mortgage shall also be a lien on the new stock so purchased; that the remainder of the proceeds of said sales shall be used in defraying all necessary expenses of carrying on and conducting said saloon;

"And the balance of said proceeds, after the said purchase of new goods to supply the place of the goods sold in carrying on and conducting of said business, so as to keep said stock of the value of $1,500 as aforesaid, and the expense of carrying on and conducting of said business as aforesaid, shall be used alone for the payment of the indebtedness hereby secured."

The mortgagor covenants to pay over to the mortgagee

"All said surplus proceeds of the sales of said stock, and to that end the said party of the first part is hereby created an agent of the said party of the second part to so sell said liquors, cigars, etc., at retail, as aforesaid; to purchase supplies for said saloon from time to time under the regulations and restrictions herein imposed; to pay off and discharge all the necessary expenses incident to and connected with the carrying on and conducting of said saloon; and to pay over and have credited upon said notes said surplus proceeds of said saloon business from time to time as aforesaid."

It is further provided that the mortgagor shall keep a correct account of his daily sales, "and account for his actions and doings

once a month, until the full payment of the indebtedness hereinbefore mentioned."

On the face of this mortgage, its chief purpose would seem to be to preserve the stock and good will of the business, shielded from the creditors of the mortgagor. At least, that is the primary purpose. It is a first mortgage for this purpose, and a second mortgage for the payment of appellant's claim. The whole stock may eventually be consumed in defraying the expenses of the business which it is stipulated shall be kept up and continued, and not a dollar may ever be left to apply on the mortgagee's claim.

It is a very common thing for a merchant to find himself running a losing business, especially in dull times, or times of financial stringency. If such a chattel mortgage should be upheld, it would permit every merchant who found himself in such a condition to hold his assets for the purpose of continuing and keeping up his business, and, as he would hope, tiding him over the dull times. He could accomplish this by giving such a chattel mortgage to one of his creditors, which would serve as a shield against all of his creditors. The mortgage, on its face, permits the mortgagor to dispose of the mortgaged property for his own use and benefit. The fact that it limits such use, and prescribes the particular benefit to himself to which he shall apply the proceeds of the property, does not make the mortgage any the less fraudulent as to creditors. For cases somewhat similar to this see Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696, and Greenebaum v. Wheeler, 90 Ill. 296.

Order affirmed.

67 194
71 370

LODOWIC D. HAUSE, Receiver, v. ROBERT MANNHEIMER.[1]

January 15, 1897.

Nos. 10,208—(206).

Corporation—Estoppel to Deny Existence.

In an action to recover the balance of an unpaid subscription for stock, *held*, the defendant recognized, dealt with, and became a stockholder in a de facto corporation, and is now estopped from questioning its existence, or asserting that it never was legally organized, by reason of a failure to comply with the statute in filing with the secretary of state proof of the publication of its articles of incorporation, as required by G. S. 1894, § 2594.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff, entered in pursuance of the findings and order of Kelly, J. Affirmed.

C. D. & Thos. D. O'Brien, for appellant.

Henry B. Farwell, for respondent.

CANTY, J. The articles of incorporation of the St. Paul Athletic Park Association were duly made, and were filed in the office of the secretary of state and also in the office of register of deeds of Ramsey county, in April, 1888, and thereafter, in the same month, were published every day for a week in a daily newspaper published in St. Paul, in that county, but no affidavit of proof of such publication was ever filed in the office of the secretary of state, as required by G. S. 1894, § 2594. In Christian v. Bowman, 49 Minn. 99, 51 N. W. 663, this court held the filing of such affidavit essential to the creation of a corporation de jure.

On April 2, 1888, the defendant agreed with the promoters of this proposed corporation to subscribe for ten shares of its capital stock, of the par value of $100 each. The association began to do business in April, 1888, and continued to do the business for which it was organized until March, 1894, when, being insolvent, the plaintiff was appointed receiver for it in an action under G. S. 1894, c. 76. In the meantime there had been meetings of the stockholders and board of directors of the association, it had elected

[1] Reported in 69 N. W. 810.

officers, "purchased and took a conveyance to itself as a corporation" of certain real estate in West St. Paul, caused the same to be improved by building thereon, and expended large sums of money therefor. On May 12, 1888, defendant, by his duly-authorized agent, paid the association $400 as a payment on such stock, and such agent received a certificate of stock for said ten shares of stock, signed by the president and secretary of the association, and sealed with its corporate seal. "Thereafter, and on or before May 1, 1889," defendant paid $200 more on said stock. The receiver brought this action to recover the balance of $400. The court below found for plaintiff, and, from the judgment entered thereon, defendant appeals.

The only ground for reversal urged by appellant is that, as no proof of the publication of the articles of incorporation was ever filed in the office of secretary of state, the alleged corporation was never legally created, and he contends that, therefore, plaintiff is not entitled to recover on the stock subscription. We cannot so hold. Under the definition of a corporation de facto laid down in Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, this association was such a corporation. But that is not all. Defendant dealt with the association as a corporation, and as a member thereof. As held in Foster v. Moulton, 35 Minn. 458, 29 N. W. 155, such an association, though not a corporation de jure, is, as between itself and its members, to be treated as a corporation de facto. See, also, Minnesota G. L. E. Co. v. Denslow, 46 Minn. 171, 48 N. W. 771; Columbia E. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244. In such a case the member is estopped from denying the existence of the corporation.

Of course, if appellant had never recognized the existence of this corporation, and had never dealt with it as such, he would not be thus estopped. The making of the original subscription before the association was formed, or claimed to be formed, would not be such a recognition or such a dealing. He contends that he has never since recognized it or dealt with it. The court below found as facts:

"That the defendant never had any personal knowledge of the transaction of any business by said association, or of the amount of the stock to be issued by it, or the amount that was subscribed for it,

or any personal knowledge of the issuance to himself of the stock certificate hereinbefore mentioned, except that after said certificate was delivered to said Goodkind [said agent] for defendant, but exactly at what time does not appear, the defendant was told that said certificate had been so delivered to, and received by, said Goodkind."

But the court also found that the agent, Goodkind, was authorized by appellant to pay the $400 for him, and that, at the time Goodkind paid it, the association delivered the stock certificate to him for defendant.

Again, the appellant himself afterwards paid $200 on the stock. Then, even if he did not have any personal knowledge of the transactions of the association, there were sufficient circumstances known to him to put him on inquiry. He paid $600 on his stock subscription, and, according to his own position, neglected for five or six years to inquire what had become of the $600 or the association, and during all of this time, both before and after he paid this money, the association was carrying on, in a most open and public manner, the very business for which it proposed to organize. If Goodkind was authorized to receive the certificate, his act in receiving it was the act of his principal. If he was not so authorized, still the long delay of the principal, and his failure to repudiate his agent's act in receiving the certificate, in connection with the other facts found by the court, conclusively show a ratification of such act by the principal. In either case the act of the agent in recognizing and dealing with the association must be regarded as the act of appellant; and this was followed up by the appellant's personal act in paying $200 more to the association.

Judgment affirmed.

JOSEPH PREINER v. PETER H. MEYER.[1]

January 15, 1897.

Nos. 10,266—(220).

Estoppel.

On the facts in this case, *held*, the grantee of the mortgagor is not, as against the mortgagee, estopped from asserting a paramount title.

Documentary Evidence.

Certain certificates and letters of the register of the local land office and the commissioner of the general land office *held* to be each the mere legal conclusion of the officer as to the legal effect of records in his office, and of no weight as evidence.

Title—Presumption.

Except as hereinafter stated, neither party connected himself with the government title. The plaintiff mortgagee proved that the mortgagor was in possession of the land at the time he made the mortgage. It appeared that he subsequently conveyed to and delivered possession to the defendant, who applied to the officers of the United States land office to enter the land as a homestead, and his application was pending at the time of trial. Under these circumstances, *held*, it cannot be presumed that the title to the land is in the United States, and a finding to that effect is not sustained by the evidence.

Appeal by plaintiff from an order of the district court for Morrison county, Searle, J., denying a motion for a new trial. Reversed.

Lindbergh, Blanchard & Lindbergh, for appellant.

Oscar Taylor, for respondent.

CANTY, J. On November 27, 1888, Nicholas Meyer was in possession of the land here in controversy, and on that day mortgaged the same to a loan company. The latter, pursuant to statute, foreclosed the mortgage under the power of sale therein contained, and plaintiff bid in the land at the foreclosure sale. The time to redeem expired, and no redemption was made. In the meantime, Nicholas Meyer conveyed the land to his son, the defendant, who entered into possession of the same; and, when the year to redeem

[1] Reported in 69 N. W. 887.

expired, plaintiff brought this action against him in justice's court, under G. S. 1894, § 6118, to recover possession of the premises; obtained judgment of restitution; and defendant appealed to the district court, where, on a trial before the court, without a jury, judgment was ordered for defendant as to the land in section 35, and for the plaintiff as to the land in section 34. From an order denying a new trial, plaintiff appeals to this court.

The district court found as facts that the mortgagor never had any title to the part of the mortgaged premises situated in section 35, but that the same is government land, subject to entry as a homestead; that defendant is qualified to make such a homestead entry, and

"Sought to obtain title thereto by making such homestead application and entry on the 13th day of February, 1895, which application is still pending in the department of the government at Washington, and is undecided; that the defendant, at the time of the commencement of this action, claimed to hold and have possession of said lands by virtue of his said homestead entry and application, and not otherwise."

1. If this finding is sustained by the evidence, we cannot hold that, as contended by appellant, defendant is estopped from asserting such a claim against appellant. True, defendant cannot defeat this action by showing merely that the mortgagor had no title. He mortgaged what title he had, and neither he nor those claiming under him can withhold from the mortgagee the benefits of that title, such as it is. But the grantee of the mortgagor is not estopped by any covenant made by the latter to the mortgagee, and may connect himself with a paramount title, and set up the same to defeat the mortgagee. Such a case is essentially different from one where a party receives the possession under an agreement, express or implied, to restore it at a certain time, or on certain contingencies, to the person invoking the estoppel. Such an estoppel exists between landlord and tenant, and between the vendor and vendee in an executory contract for the sale of lands.

2. But we are of the opinion that the findings of the court that the mortgagor had no title to the land here in question, but that the title is in the United States, are not supported by the evidence.

It seems to us that, on the evidence, neither party has connected himself with the government title. Plaintiff introduced in evidence

a deed of this land from the Western Railroad Company of Minnesota to Nicholas Meyer, dated March 19, 1881, the mortgage from the latter, and the foreclosure proceedings, and also introduced evidence tending to prove that Nicholas Meyer was in exclusive possession of the land for about 20 years prior to the trial, except during the last year prior to such trial, during which year defendant was in possession.

Plaintiff also introduced in evidence an order, dated April 9, 1857, from the land commissioner to the register and receiver of the local land office, withdrawing from entry and sale the land in question and other lands, giving, as a reason for such withdrawal, that the lands fell within the probable line of routes under the grant to the territory of Minnesota by act of congress approved March 3, 1857,[2] to aid in the construction of certain railroads in that territory. No revocation of this order of withdrawal appears ever to have been made. There are in the record other certificates of the officers of the local and general land office, which we will now notice. One is in the following form:

"St. Cloud, Minn., June 21, 1895.

"I, Theo. Bruener, the undersigned, register of the United States land office at St. Cloud, Minnesota, hereby certify that it appears from the tract books, plats, records, and files of said land office that the [here follows a description of the land in controversy] have been selected by the Brainerd branch of the St. Paul and Pacific R. R. Co., December 31, 1877, list No. 2, and also by the Brainerd branch of the St. Paul & Pacific R. R. Co., February 12, 1892, list No. 2."

There is another certificate, dated July 31, 1895, in the same form, made by Bruener, as register, in which he states that it appears from the records in his office that the land in question has been selected by said Brainerd branch. These certificates are the mere legal conclusions of the register as to the legal effect of records in his office, and are of no weight whatever as evidence, even if received without objection. The register cannot in this manner be made the judge of this case, or of portions of this case.

There were also introduced in evidence two letters from the commissioner of the general land office to defendant's attorney, each stating that it is in answer to a letter requesting a certificate to

[2] 11 Stat. 195.

the effect that it appears from the records and files in the land office that the title to this land is in the United States. One of these letters states further:

"In reply, you are advised that this office only certifies to copies of the official records and papers on file, and not to abstract statements drawn therefrom. Consequently, such a certificate as you desire cannot be furnished you."

It also states that the records of the office show that the land in question has been selected by the Western Railroad Company, but that the title to the same is still in the United States, and the commissioner offers to furnish properly certified copies of the records. The other letter is of a later date, and reiterates these statements. The same must be said of these letters as of the certificates above referred to: The statements in them as to what the records of the general land office show as to the title to this land are but the mere conclusions of the writer, and not evidence.

Under G. S. 1894, §§ 5734, 5753, 5754, 5757, a certified transcript of the entries in the records and books in either the local or general land office, and certified copies of other documents in the same, are competent evidence (Tidd v. Rines, 26 Minn. 201, 2 N. W. 497); and, under section 5732, the officer may certify that he has made diligent examination in his office, and that the entries and documents so certified to by him are all of the records that can be found in his office pertaining to or referring in any manner to the land in question. But no such certificate was obtained in this case. There was also introduced in evidence an order from the commissioner to the register and receiver of the local land office, dated October 5, 1894, in reference to other lands, and declaring certain selections of the Northern Pacific Railroad canceled, and also another order, dated January 31, 1895, revoking said last-named order. This is all of the evidence that it is necessary to consider.

While plaintiff failed to connect himself with the government title, he was not obliged to do so, unless defendant claimed, and was entitled to claim, through some other title than that through which plaintiff claimed. If plaintiff and defendant both claim through the same source of title, to wit, the Western Railroad Company and Nicholas Meyer, defendant is estopped to deny plaintiff's title; and in such a case the failure of plaintiff to show a title from the Unit-

ed States to him raises no presumption that the title is in the United States. The fact that defendant refuses to claim through or assert such title, when it is the only one he ever appeared to hold, does not alter the presumption. Nicholas Meyer had the prior possession, and it is presumed that he, and not the United States, was the owner at the time of such possession. Undoubtedly, defendant could have destroyed this presumption by showing a conveyance or certificate of entry from the United States to himself. But he has not done this. He has simply shown that he has offered to make such an entry,—applied to make it; that he, and not the United States, asserted that it has the title to this land. Under all of the circumstances, it cannot be presumed, in favor of defendant, that the title to this land is in the United States, and the finding of the court that it is, cannot be sustained, as it is not supported by the evidence.

The order denying a new trial is reversed, and a new trial granted.

CHRIST KNUTSON v. NORTHWESTERN LOAN & BUILDING ASSOCIATION.[1]

January 15, 1897.

Nos. 10,376—(282).

67 201
73 215
73 324
73 326

Building Association—Insolvency—Rights of Members.

When, by reason of losses, there was such a deficiency in the assets of a building and loan association that it could not mature its stock, the purposes for which it was organized could not be carried out, and the court proceeded to wind it up, *held*, this put an end to the contract between it and its members, at least so far as future performance was concerned.

Same—Rescission.

Held, further, in adjusting matters between it and its members, the court should proceed on the principle of rescission, as far as the same can be equitably and justly applied, and each member should, to that extent, receive back what he paid, and pay back what he received.

Same—Losses and Expenses—Set-Off.

But *held*, it is the duty of each member to bear his share of the losses and expenses of the association, and the expenses of the receiver ap-

[1] Reported in 69 N. W. 889.

pointed by the court. Therefore the borrowing member is not entitled to set off all that he has paid against the loan or advancement which he has received; but a sufficient portion of what he has so paid should be held until final distribution, to cover such losses and expenses, and only the rest of what he has so paid should be set off against such loan or advancement, and the remainder of such loan or advancement should be collected from him.

Same.

Held, it does not appear that the court below ordered an unreasonable amount of what each borrowing member so paid in to be so held to cover such losses and expenses.

Appeal by Annie S. Peterson and others from an order of the district court for Hennepin county, Jamison, J. Affirmed.

E. F. Crawford, for appellants.

See Waverly M. & P. L. L. & B. Assn. v. Buck, 64 Md. 338, 1 Atl. 561; Windsor v. Bandel, 40 Md. 172; Buist v. Bryan, 44 S. C. 121, 21 S. E. 537; Low St. Bldg. Assn. v. Zucker, 48 Md. 449.

Frank R. Hubachek, for respondent.

The appellants cite Maryland and South Carolina decisions to the effect that they should be credited with their stock payments. These decisions treat the borrowing member and the insolvent association as strangers, and the transaction of borrowing as a naked loan. These states hold such loans usurious where interest and premium together exceed the legal rate of interest. Waverly M. & P. L. L. & B. Assn. v. Buck, supra. The Minnesota statute and decisions, on the contrary, hold such a contract not usurious. The weight of authority holds that insolvency affects borrowing as well as other members of the association. Silver v. Barnes, 6 Bing. N. C. 180; Burbridge v. Cotton, 8 Eng. Law & Eq. 57; Seagrave v. Pope, 15 Eng. Law & Eq. 477; Massey v. Citizens' B. & S. Assn., 22 Kan. 624; Hoboken B. Assn. v. Martin, 13 N. J. Eq. 428; Towle v. American B. L. & I. Assn., 61 Fed. 446; American H. Co. v. Linigan, 46 La. Ann. 1118, 15 South. 369; Eversmann v. Schmitt, 53 Oh. St. 174, 41 N. E. 139; Fagan v. People's S. & L. Assn., 55 Minn. 437, 57 N. W. 142.

CANTY, J. The Northwestern Loan & Building Association, a corporation, was organized as a building and loan association. It

became insolvent, in the sense that its assets had depreciated, and it would not be able to mature its stock, and a receiver was appointed to wind it up. One McLaughlin, a borrowing member, made a proposition of settlement. The receiver submitted such proposition to the court, and asked for instructions as to how he should settle with McLaughlin and all other borrowing members. The court, on proper notice, made an order instructing the receiver to accept McLaughlin's proposition, and settle with all the other borrowing members in the same manner. From this order a number of such other borrowing members appeal.

According to the plan of the association, the par value of the stock, when matured, would be $100 per share. McLaughlin took 10 shares of stock, and on April 14, 1892, procured a loan or advancement of $1,000 on the same. He agreed, pursuant to the by-laws, to pay each month 50 cents premium and 50 cents interest on each $100 of the loan, and also to pay 65 cents per month dues on each $100 of his said stock, "until the dues so credited on the stock, together with the dividends declared thereon, shall equal the amount loaned." The performance of this agreement was secured by a bond and real-estate mortgage given by McLaughlin. He made these payments from that time until the commencement of the proceedings to wind up the corporation, when he had paid:

On stock	$233 24
As interest	235 00
As premiums	235 00
Total	$703 24

Pursuant to his said proposition, the court ordered that he be charged with the $1,000, and interest thereon at the rate of 7 per cent. per annum from the date on which he borrowed the same, and that he be credited with the sums so paid as interest and premiums,

"Together with interest at 7 per cent. per annum on said payments of interest and premiums from their respective dates in the manner of partial payments, * * * leaving the stock payments made by him, the said McLaughlin, of $233.24 * * * in the hands of said receiver, to await the winding up of the said corporation, and to be paid back to him, the said McLaughlin, in the regular course of distribution by the receiver."

The by-laws, among other things, provide:

"Sec. 34. Each investing member shall pay into the treasury of the association not less than sixty-five cents per month on each one hundred dollars of running stock owned by him, * * * until such monthly payments, together with such other sums as he may choose to pay, and such dividends as may be declared thereon, shall together amount to the face value of said stock, at which time the member shall be entitled to receive the par value thereof in cash."

"Sec. 36. All loans shall bear interest at the rate of six per cent. per year during the continuance of the loan, payable at the rate of fifty cents per month on each $100 of loan made.

"Sec. 37. All loans shall bear premium at a rate fixed annually by the board of directors.

"Sec. 38. Each borrowing member shall pay to the association not less than one dollar and sixty-five cents per month on each one hundred dollars of loan made to him, which sum shall be applied as follows: First. To the payment of any fines or other assessments made against him in pursuance of the by-laws. Second. To the payment of the premium due on such loan. Third. To the payment of the interest due on such loan. Fourth. The balance of such payment shall be credited as dues on the stock on which such loan is taken. Such payments shall be continued until the dues so credited on the stock, together with the dividends declared thereon, shall equal the amount loaned. The loan and the stock on which it was taken shall then both be canceled, and the borrower's mortgage released."

"Sec. 43. The board of directors, on the first day of January and July of each year, shall declare such dividends as may accrue from the earnings of the association, after deducting therefrom all expenses and losses, and also such sum as they may reserve for the fund used for the payment of contingent losses."

Section 48 provides that investing members may withdraw at any time, and shall receive back certain specified portions of the amounts paid in, not exceeding the net profits of the association. It further provides:

"A borrower may pay off his loan on application, at any time, by paying the balance due after deducting the value of the shares assigned to the association as collateral; or the shares may be redeemed and retained by paying the amount of the loan in full."

It also appears from the report of the receiver that less than one-third in cost of the assets of the association is invested in present mortgage loans (made to its members); that the rest of such assets consist mainly of real estate which cost the association very much

more than its present value; and that all that can be realized from all of the assets will repay the present members much less than they have contributed to the association.

The so-called "insolvency" of the association, and the proceedings to wind it up, put an end to the contract between it and its members, at least so far as future performance is concerned. Strohen v. Franklin S. F. Assn., 115 Pa. St. 273, 8 Atl. 843; Brownlie v. Russell, L. R. 8 App. Cas. 235; Towle v. American B. L. & I. Assn., 61 Fed. 446.

Again, the original scheme has totally failed, and can be carried out in scarcely any particular. The members can no longer withdraw in the manner provided by the by-laws. Brownlie v. Russell, supra. The stock can never be matured, and the members have no right to be repaid in the order in which the stock of each would have matured if the scheme was successful, and had been carried through. Then, in winding up such a corporation, we can see no principle on which to proceed in adjusting matters between it and its members, except the principle of rescission, so far as the same can be equitably and justly applied. Each member should, to this extent, receive back what he paid and pay back what he received.

It may be urged that the theory of rescission here adopted will, in many cases, offer a great inducement to the borrowing member to attempt to have the association wound up by the court. For instance, where the borrowing member has paid, or agreed to pay, a large amount of premium for the loan or advancement to him, he will receive back the premiums paid and escape payment of the unpaid premiums if he can wind up the association and settle with it on the theory of a rescission of his contract. But it must be remembered that, before the association can be thus wound up, there must be such a deficiency of assets that it appears that the scheme has failed, and the purposes for which the association was organized cannot be carried out. Where there are no outside creditors, such deficiency of assets does not constitute insolvency, in any proper sense of the word, but is merely a loss of corporate capital, and a consequent depreciation in value of the stock held by the members. Then the remedies for winding up a corporation on the ground of insolvency do not apply.

However, a court of equity has jurisdiction to wind up a corporation when the purposes for which it was organized have wholly failed. 1 Morawetz, Priv. Corp. (2d Ed.) §§ 285, 286; Towle v. American B. L. & I. Assn., supra. When there is such a deficiency of assets that the scheme has failed and the stock cannot be matured, it can hardly be said that there is any adequate or substantial consideration for the premiums so agreed to be paid for the loan; for the expected consideration has largely or almost wholly failed. The benefits to be derived from membership have failed. The benefits expected to be derived by the borrowing members from the premiums to be paid by themselves, and divided between themselves and the nonborrowing members, have also largely failed. Then we are of the opinion that, in adjusting matters between this corporation and its members, the principle of rescission should be applied as far as it is just and equitable. There may, however, be items to which this principle could not be applied; such, for instance, as fines and penalties imposed to compel observance of the by-laws and a prompt and orderly transaction of business. As to this we express no opinion.

But, while each member should receive back what he paid and pay back what he received, it is the duty of each member, whether borrower or nonborrower, to bear his share of the losses and expenses of the corporation, and also the expenses of winding it up. These members are not strangers to the corporation, and have not dealt with it as such, but each is a member of the corporate entity. Then, as far as such losses and expenses are concerned, there can be no rescission.

It follows, therefore, that the borrowing member is not entitled to set off all that he has paid against the advancement or loan which he has received. If the borrowing members are permitted to do this, it will throw the whole burden of such losses and expenses upon the nonborrowing members. Then the borrowing member should only be allowed to set off a part of what he has paid against the loan or advancement which he has received, and the balance of such loan or advancement should be collected from him, thereby leaving the other part of what he has so paid to be held until final distribution, and applied, as far as necessary, on such losses and expenses. The part which should be thus held to cover such losses

and expenses should be such an amount as the court is fully satisfied will cover the same.

From the state of affairs reported by the receiver in this case, it appears highly probable that there will be a considerable shortage of assets when all of the same are converted into cash, and we cannot say that the court below erred by ordering too large a part of the amounts paid in by McLaughlin and the other borrowing members to be so held to meet their share of the shortage; that is, their shares of such losses and expenses. McLaughlin had another lot of stock on which he had received another loan or advancement, and the court below made a like order as to it.

This disposes of all the questions raised, and the order appealed from is affirmed.

ELIZABETH L. GARDNER v. FIDELITY MUTUAL LIFE ASSOCIATION.

FENTON G. WARNER v. SAME.[1]

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January 18, 1897.

Nos. 10,181, 10,182—(149, 150).

Mutual Benefit Insurance—Cancellation of Policy—Powers of Agent.

Rulings of the court below on the trial together of these actions, upon objections made to certain offers to introduce testimony of the same general character, considered and disposed of. *Held*, that the rulings were correct.

Appeals by plaintiff in each case from an order of the district court for Ramsey county, Charles D. Kerr, J., denying a motion for a new trial. Affirmed.

James E. Trask and *H. J. Horn*, for appellants.

Warner, Richardson & Lawrence, for respondent.

COLLINS, J. These actions were by consent tried before a jury together, but as separate cases, and at the conclusion of the evidence the court directed, and the jury returned, a verdict in each case for defendant. On appeal from orders denying motions for new trials, they were argued and submitted together.

[1] Reported in 69 N. W. 895.

The defendant is a mutual benefit association, organized under the laws of the state of Pennsylvania, on the mutual assessment plan. The action in which Mrs. Gardner is plaintiff is upon a certificate of date December 8, 1893, whereby the life of Clarence B. Gardner—who was plaintiff's unmarried son—was insured for the sum of $2,500, and in which plaintiff was designated as beneficiary. The other action, Warner being plaintiff, is upon a certificate of date January 11, 1894, insuring the lives of the plaintiff, Warner, and said Clarence B. Gardner for the sum of $5,000, payable to the survivor upon the death of either. At the time of the issuance of this certificate, Warner and Gardner were co-partners in business, and so remained until some time in June, 1894. Gardner died in September of the same year, and proofs thereof were duly made and filed with the association. It refused to pay, and these actions were brought.

The complaint in the Gardner case was in the usual form, but in the Warner case it was averred, in addition to the usual allegations, that on August 16, 1894, the defendant association obtained from Warner and Gardner an assignment of the joint certificate by means of false and fraudulent representations and undue influence.

Stated as concisely as possible, the defense interposed by the answers was that on August 10, 1894, the beneficiary named in the certificate for $2,500 had been duly changed by a surrender of the certificate itself, on request made by the insured, and the issuing of a new certificate to him, in which Warner was named as beneficiary, and that immediately afterwards, for a valuable and adequate consideration, and at the express solicitation and request of the insured, Gardner, and the beneficiary, Warner, said new certificate was duly surrendered to the association and canceled. It was also alleged that, at the same time and under the same circumstances, the joint certificate for $5,000 was duly surrendered to and canceled by the association. There was another allegation to the effect that all payments made to defendant on account of these certificates were made by the insured, and by no other person. In the Warner case the answer denied that false or fraudulent representations had been made, or undue influence used, to procure possession of the $5,000 certificate.

The reply in each case denied that either certificate had been sur-

rendered to or canceled by the association. It was alleged, in the Gardner case, that through false and fraudulent representations and undue influence the association had induced the insured to apply for a change of beneficiaries and the substitution of Warner for his mother, and that such change was made on account thereof; and it was also alleged that subsequently, and by means of false and fraudulent representations and undue influence, Warner, the substituted beneficiary, and Gardner, the insured, were induced to make, and that defendant procured, an assignment to it of the new certificate for $2,500 without consideration.

On the issues thus made the trial was had, and from the evidence it conclusively appeared that, at the express request of the insured, the $2,500 certificate had been received by the association, and, in form, a new one had been substituted, and delivered to him, in which Warner had been designated as the beneficiary. It also conclusively appeared that, soon afterwards, Warner and Gardner went before a notary public, made oath to certain affidavits, signed and acknowledged an assignment to the association of each certificate, and handed them to one Pleins, to be delivered to the assignee. Soon afterwards Pleins appeared at the office of Gardner and Warner with a draft upon the association for $1,500, made by its authorized agent, and payable to the order of Gardner. The latter indorsed the draft, and requested Pleins to obtain the money thereon. Pleins went to a bank, deposited the draft to his own credit, paid $50 upon Gardner's note then held by the bank, and took a certified check for $1,100, payable to the order of Gardner and Warner. He returned to the office, gave this check to Gardner, and told him of the $50 payment. It was agreed that Pleins was to retain the balance, $350, for his own services in obtaining the money from the association. Both certificates in which Warner was beneficiary were then in the safe in the office. Warner took them out, and handed them to Pleins, to be delivered to defendant association. From Warner's evidence at the trial it is beyond question that he was an active participant in the whole transaction. It was not shown what had become of the certified check, but the money to cash the same had been set apart out of Pleins' funds by the bank officials, and had not been called for when the cases were tried.

The testimony was undisputed that, at the request of both Gard-

ner and Warner, Pleins went to Pennsylvania as their accredited agent, and for the purpose of inducing the association to make a cash settlement upon the certificates, in view of the alleged fact that Gardner's health had failed, that he was without means, and that his purpose was, if the settlement could be made, to go South, in the expectation that he might recover; that the officers of the association at first declined to act upon the proposition, but finally, and with reluctance, and not until they had made a thorough examination as to the alleged failure in health, and the good faith of both insured and beneficiary, they consented to take the assignments and pay over the money. Even then they required the representations of Gardner and Warner to be made under oath, and they were contained in the affidavits we have referred to. It was also beyond dispute that, at the time of the transaction, and for some months previous, Pleins was and had been in the employ of the association as a soliciting agent.

The "settled case" on which the motions for new trials were founded, and which has been brought before us on this appeal, does not purport to contain all of the evidence received at the trial below, and therefore we are compelled to treat it as a bill of exceptions only. The final ruling, when the court ordered that a verdict for defendant be rendered in each case, cannot be considered; our investigation being confined to an examination of the rulings on the admissibility of testimony alleged to have been erroneously excluded. Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837.

On the trial appellants' counsel repeatedly attempted to show that, from the beginning of the negotiations which led to the payment of the money and the assignment and surrender of the certificates, Pleins made false and fraudulent statements and representations to Gardner, the insured, and to Warner, the beneficiary, concerning all three of the certificates, and their value in case of the decease of the insured, and also as to the defendant association; that both of these persons relied upon these statements and misrepresentations, and believed them to be true; and that by reason thereof Gardner was induced to surrender the first certificate for $2,500, and to take out in lieu thereof the certificate for the same amount in which Warner was designated as the beneficiary; and, further, that by reason of these same false statements and repre-

sentations, and in the belief that they were true, both Gardner and Warner were induced to surrender up and to assign to the association the certificate last mentioned and the joint certificate for $5,000. And, as those questions were asked and offers made, the court sustained each objection thereto, apparently for the reason that there was no evidence in the case tending to show that Pleins was anything more than a soliciting agent for the association, or that he possessed any authority or power outside of this.

If, upon the evidence as it stood, Pleins' authority to act for defendant was limited and restricted to merely soliciting and procuring memberships, it is obvious that his statements, not within the scope of his agency, would not bind his principal, in the absence of proof that he had been held out as authorized to make them, or subsequently and with knowledge of the facts the association had ratified what he said and did. We have no doubt but that, prior to the moment that the contract of agency between Pleins and defendant (the latter's Exhibit 1) was put in evidence, and this was before plaintiffs rested, the rulings were correct. But in that contract was a clause which, in connection with other testimony, had it been offered, might have changed the situation, and have rendered the subsequent rulings erroneous.

This contract in terms constituted Pleins an agent for the purpose of procuring applications for insurance on the lives of individuals, and forwarding them to defendant association for approval or disapproval, and, if approved, and certificates were issued, for collecting the amount due upon receipts for dues or premiums accompanying the certificates. It was expressly provided that Pleins should not be an agent for any other purpose, but, in specifying the manner in which he should perform his duties as solicitor and collector, it was provided that he should perform such other necessary duties as might be required, in connection with the general business of defendant association, without other compensation than the previously stipulated commissions as a soliciting agent and collector. So that, by the terms of the contract, Pleins might be required to exercise agency powers and duties of a special or general character, independent of those of a solicitor or collector; or, to put it in another form, he might have been engaged, authorized, and empowered by the association to open, conduct, and complete the nego-

tiations with Gardner and Warner in which the false and fraudulent statements and representations are alleged to have been made, and in such event the liability of the association for Pleins' fraud could not well be questioned. But it was optional with it so to require, and the burden of proof was on the plaintiffs to show that it had exercised this option, and had required Pleins to open or conduct these negotiations, or that Pleins had been held out as an agent authorized to act in this behalf. It could not be inferred from the fact that these acts might be required of him. As a soliciting agent and collector of dues or premiums to be paid upon certificates when delivered, he could not bind the company by the statements plaintiffs attempted to prove; but, if the association actually required the performance of other general duties, as it had the right to do, or if he was held out as having been so required, a different case would be presented.

So the question is, was any attempt made by plaintiffs' counsel to show either that Pleins had been required or employed to procure the surrender or assignment of the certificates, or to treat with Gardner or Warner, or had the latter been led by the association to suppose that he had? It was not claimed upon the trial that either had any knowledge of the existence of the clause we have spoken of in the special agency contract, or that the association knew, or should have known, that Pleins, acting outside of his powers as a special agent, had assumed to speak for it generally, or had made false or fraudulent representations with a view of securing the certificates, or that the insured had been induced by him to solicit a money payment on the same in consideration of cancellations. The bill of exceptions shows that the offers of evidence were confined exclusively to statements made by Pleins before he went to the principal office of the association in Pennsylvania, armed with written authority from Gardner and Warner to accept a part of the insurance at once, for which they proposed to cancel the certificates; the reason given for this proposal being that Gardner wished to use the money in an effort to regain his health, and that Warner was willing and anxious for him to do so.

No attempt was made to show, nor has it been claimed, that, up to this time, the association had any knowledge of Gardner's ill health, or that he or his beneficiary had any cause for seeking to

obtain an immediate cash payment, or had thought of so doing. Nor, when the rulings were made, had there been any offer to prove that the association had required or authorized Pleins to act for it in this or any other transaction, except as a solicitor of insurance and a collector of dues and premiums. The offers which the court ruled upon were not broad enough to have been of any value. They should have included an offer to show that the association had exercised the option right provided for in the contract, or that Pleins had otherwise been authorized to represent it in this matter, or that, without actual authority, he had been held out as empowered to act in its behalf, or that, with knowledge of what had been done, it ratified his acts. The court ruled correctly upon the offers as made.

The motion for a new trial in each of these cases was also upon the ground of newly-discovered evidence. This feature of the appeal we cannot consider. It has not been made to appear by a proper certificate that the "case" contains all that was presented to and considered by the court below upon this branch of the motion. The rule upon this subject, laid down in Hospes v. Northwestern M. & C. Co., 41 Minn. 256, 43 N. W. 180, and several other later cases, is directly in point here.

The orders appealed from are affirmed.

BOARD OF COUNTY COMMISSIONERS OF GOODHUE COUNTY v. DULUTH, RED WING & SOUTHERN RAILROAD COMPANY.[1]

January 18, 1897.

Nos. 10,211—(219).

Railroad Crossings—Duty of Company.

G. S. 1894, § 2685, which requires that all railway companies shall build, or cause to be built, and kept in repair, good and sufficient crossings at all points where public highways may be intersected by railway lines, is applicable to a case where, in the course of construction of a railway, a stream of water has been turned from its natural channel into an artificial one, wholly upon the right of way, and has, by reason thereof, made

[1] Reported in 69 N. W. 898.

it necessary for the company to build a bridge over the stream, as a part of an approach or highway crossing of the railway tracks. If the bridge is necessarily a part of the approach or crossing, it must be built and kept in repair by the railway company.

Appeal by defendant from an order of the district court for Goodhue county, Williston, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $442. Affirmed.

Wilson & Foot, for appellant.

A bridge over a highway built by an individual but used by the public must be kept in repair by the public. Green v. Town of Bridge Creek, 38 Wis. 459; Rex v. Inhabitants, 5 Burrow, 2594; King v. Inhabitants, 2 East, 341 and note; King v. Inhabitants, 13 East, 95; Heacock v. Sherman, 14 Wend. 59; Dygert v. Schenck, 23 Wend. 446; Angell, Highways (2d Ed.) §§ 164, 257; Thompson, Highways, pp. 12–14. G. S. 1894, § 2642, refers to the longitudinal occupation of a street by a railroad, and is not mandatory. Strictly the county has no property in land occupied by a highway. City of Milwaukee v. Milwaukee & B. R. Co., 7 Wis. 76.

J. C. McClure, for respondent.

The appellant never acquired the right to cross or occupy any part of this highway. The public easement of a common highway does not include the right to use such highway as a railroad as against either the owner of the land or the public. Gray v. First Division, 13 Minn. 289 (315); Kaiser v. St. Paul, S. & T. F. R. Co., 22 Minn. 149. The railroad company was bound to keep the bridge in repair. People v. Troy & B. R. Co., 37 How. Pr. 427.

COLLINS, J.[2] The defendant company built its railway in the year 1888 through a valley in which ran a very sinuous stream, known as "Hay Creek." The creek was crossed by a county road, and the public authorities had built and maintained a bridge over it for many years. To avoid the construction of two bridges over the creek, defendant company cut a ditch about 100 feet long on the easterly side of, and within, its right of way, from a point above to a point below the highway, whereby the waters of the creek were

[2] Buck, J., took no part.

turned from the natural channel into an artificial one, wholly on the right of way. Along the highway the new channel was about 150 feet from the old, and at the point where the highway intersected the railway the latter was on a 15-foot grade; the creek, in its new channel, running close to the embankment. The company made an approach to the top of the grade by building a bridge, commencing at a point about 19 feet from the center of the track, and extending it easterly along the center of the highway, across the creek, to the high land, a few feet east of the easterly line of its right of way. It did nothing with the old bridge, and two or three years afterwards the public authorities removed it, and put in a box culvert and some earth in the old bed of the stream.

The approach and bridge built by defendant were partly or wholly destroyed by a flood in 1890, and were then rebuilt by it. They were again destroyed by a flood in 1895, and, although duly notified and required to rebuild by the authorities, the defendant refused so to do. The approach and bridge were then put in by the county, and this was an action to recover the cost of the same. The verdict was in favor of the plaintiff for the full amount, and defendant appeals from an order denying its motion for a new trial.

The cause seems to have been tried and submitted to the jury upon the theory that constructing its railway across the public road, and changing the course of the stream so that the waters ran in another channel, without first securing the right by condemnation proceedings, and locating and building a bridge at a point on the highway not theretofore occupied for that purpose, changing the location of the "bridge," as it was called upon the trial, without first entering into an agreement with the public authorities, rendered the defendant a trespasser, to be treated as a wrongdoer, and liable in damages to the public for the consequences of its wrongful acts. The jury was charged that the defendant was a trespasser, to which counsel duly excepted, and was charged that, under the pleadings and proofs, plaintiff was at least entitled to recover nominal damages, and might recover actual damages, not to exceed the cost to the county of rebuilding the bridge. To this counsel did not except.

It is assigned that the court erred in not granting defendant's motion to dismiss when plaintiff rested, and in charging that de-

fendant was a trespasser, and in holding that the verdict was supported by the evidence. Counsel for appellant stated in his brief, and admitted in his oral argument, that the first question for consideration is, was it the duty of his client to reconstruct, replace, and maintain the bridge? The other questions stated by counsel to be involved in the appeal cannot be, if the absolute duty was imposed upon his client to maintain the bridge, for in such event they became immaterial.

By G. S. 1894, § 2685, it is required of all railway companies that they build, or cause to be built, and kept in repair, good and sufficient crossings of their railway lines, at all points where any public highway is now, or may hereafter be, intersected by such lines of railway. And in section 2686 a "sufficient crossing" is defined as a grade of earth on each side of the track, 32 feet in width, and of such slope as the officers having charge of the highway shall deem necessary. It was therefore incumbent upon the defendant to build and keep in repair a sufficient crossing at the point where its road intersected this highway; in other words, to construct and keep in repair approaches to its 15-foot embankment (on the top of which was its track), 32 feet wide, of such a slope along the public road, and on each side of the embankment, as was satisfactory to the authorities. This was a statutory duty, under all circumstances. It could not be evaded by intersecting the highway in such close proximity to the stream that a bridge became necessary as a part of the approach and crossing, nor could it be evaded by changing the channel of the creek so that the waters flowed at the bottom of the defendant's embankment, and wholly upon its right of way.

The duty of the defendant to build and to keep this crossing in repair was precisely as if defendant had, for some other reason, excavated a ditch across the highway, along the base of its embankment, and had never turned the waters of the creek into it. In such a case no one would contend that the duty rested upon the public either to build the approaches, or to repair them, if they became impassable. And, while the statute requires the approaches to be of earth, it is to be reasonably construed. It would not require the filling up of a stream, or the filling of a necessary excavation for the collection and safe conduct of surface waters. Nor would sec-

tion 2685 be inapplicable because the natural conditions made it necessary that a bridge or culvert be erected as a part of the approach and crossing.

From the undisputed facts here, it conclusively appeared that the bridge in question was, by the defendant's act when changing the channel of the stream, made necessary as a part of the crossing and approach on the east side, and was in fact a part of it when washed out by the flood. This was fully shown by the plaintiff prior to the motion to dismiss, and it was not error to deny the motion. The duty to repair or reconstruct the crossing remained with defendant, and was not cast upon the public. And as it conclusively appeared from the evidence that it was defendant's duty to keep the bridge in a condition for public use, as a part of the crossing at the intersection of the highway with the railway, and as it stood admitted that, if this was defendant's duty, this action could be maintained, the error in charging the jury—if error it was—that defendant was a trespasser upon the highway was not prejudicial. It follows from what has been said that upon the evidence the verdict could not have been otherwise than for plaintiff.

Order affirmed.

FRANCES E. RIGGS v. SAMUEL S. THORPE and Another.[1]

January 18, 1897.

Nos. 10,253—(202).

Rescission of Contract—Fraud—Evidence.

Held, in an action for rescission of a contract upon the ground of fraud, that the verdict was supported by the evidence.

Assignments of Error.

Assignments of error relating to the rulings of the trial court upon the admission of evidence, and also to its refusal to charge as requested by defendants' counsel, considered and disposed of.

Appeal by defendants from an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $499.68. Affirmed.

[1] Reported in 69 N. W. 891.

The fifth request of defendant to charge was as follows:

Fifth. That in the absence of confidential relations, if the subject of the negotiation was one in respect to which the defendants and the agent of the plaintiff had equal opportunities for investigation, and for knowledge of existing facts, the agent was bound to observe for himself the value, and the condition of the lots as to improvement, and could not rightfully rely on any statement of the defendants in relation thereto.

Woods, Kingman & Wallace, for appellants.

M. P. Brewer, for respondent.

COLLINS, J. Action for rescission of a contract, plaintiff alleging in her complaint that she was induced to purchase from defendants, mortgage note brokers, and, in connection with another person, fire insurance agents, a promissory note and a real-estate mortgage securing the same, relying upon false and fraudulent statements and representations made by them, that there was a dwelling house upon the mortgaged premises, city lots, then occupied by the mortgagors, of a value exceeding the amount of the note, when, in fact, there was no house upon the premises, and never had been. The appeal is from an order denying defendants' motion for a new trial after a verdict for plaintiff.

The assignments of error challenge the sufficiency of the evidence to support the verdict, the correctness of certain rulings upon the admissibility of testimony, and also rulings whereby the court refused to charge as requested by counsel for defendants.

1. Plaintiff's agent, who transacted the business for her, testified positively that one of the defendants told him, at the time the negotiations were had, and the note and mortgage bought and paid for, that there was a dwelling house upon the premises, then occupied by the mortgagors, husband and wife. The defendant in question denied this, and, as between these two witnesses, it was for the jury to determine. But, it being uncontradicted that neither of the defendants had then seen the lots, it is the contention of counsel that, from the evidence, it conclusively appears that a positive statement of this character could not have been made, or, if positive in form, the agent must have understood that the defendant who made it was merely communicating to him statements concerning the house

which had been made by the mortgagors, and was not stating anything as of his own knowledge.

The evidence upon which counsel relies as disposing of the agent's testimony concerning the unequivocal statements of one of the defendants is found in the mortgagor's application for the loan, which was read by the agent before he purchased the note and mortgage, in which it was stated that the amount of the loan was to be used in building a house. But, even if this could be regarded as an assertion that there was no house upon the premises at the date of the application,—and of this there is much doubt, because, from other parts of the application, it appeared that there was,—counsel seems to have overlooked the fact that the note, mortgage, and application bore date February 6, 1892, and that the agent first saw them after April 19, and also that with the papers presented for his examination was a policy of insurance, issued from the agency of which defendants were members, dated April 19, purporting to insure a dwelling house situated upon the mortgaged lots, and occupied by the mortgagors, with loss, if any, payable to the mortgagee.

Notwithstanding the statement in the application as to the purpose for which the loan was made, it might readily be presumed by the agent, more than two months after it was signed, that the house had been completed, especially when, accompanying the papers, was a policy insuring the house, issued out of defendants' agency. Instead of conclusively showing to the agent that the house had not yet been built, the note, mortgage, application, and policy would serve to confirm an unqualified statement, made by one of the defendants, that there was a house upon the lots. We need not further discuss the evidence. It was ample to support the verdict.

That a false representation as to a material fact was made, and that the plaintiff's agent believed the representation to be true, and relied upon it, was sufficiently shown. And while an intent to deceive is an essential ingredient in these cases, positive proof that a party making the representation knows it to be untrue is not necessary. The rule in actions of this kind has frequently been stated by this court, and is that, where one makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or makes such representation as of his own knowledge when he does

not know whether it is true or false, with intent to induce the person to whom it is made to rely upon it, and this person does rely upon it, is deceived, and is pecuniarily damaged, it is deceit which will avoid the contract. The trial court so charged the jury. When the knowingly false statement is as to the belief of the party, or is as to his knowledge of the fact he assumes to state, intent to deceive is the fair and reasonable inference.

2. Counsel requested the court to charge that, "unless the jury are satisfied that defendant made fraudulent representations with intent to defraud the plaintiff," she could not rescind the contract and recover in this action. The court's refusal so to charge is assigned as error. In its general charge the court fully and fairly stated the law applicable to the case, and, under the facts and circumstances which had appeared in evidence, the request to charge, if given, would simply tend to mislead. And again, the language of the request left it to be inferred as to what extent and how the jury should be "satisfied" that the false representations had been made. In this respect it might, also, be misleading.

3. What has been said in reference to the rules of law governing this case disposes of counsel's claim that the fifth request to charge should have been given, and also to the exception to that part of the given charge in which the court stated that it was not incumbent upon plaintiff's agent to personally inspect the property before relying upon the alleged statement.

4. The mortgagor who applied for the loan, and who transacted, with one of the defendants and their clerk, all of the business for himself and his wife, was allowed to testify, over defendants' objection that, before he obtained the money upon the note, he informed such defendant that he had concluded not to build a house upon the mortgaged lots. The purpose of this evidence was to show that the defendants knew, when disposing of the note and mortgage, that there was no house upon the premises, and that, before obtaining the money from the mortgagee, the mortgagors had abandoned all intention to build, and, if the positive statement referred to was made to plaintiff's agent, that it was then known to be false. The evidence was material, and admissible upon this point. Other assignments of error need no special mention.

Order affirmed.

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AUGUST ECKMAN v. CHARLES LAUER and Others.[1]

January 18, 1897.

Nos. 10,296—(212).

Verdict—Evidence.

Held, that on the facts, as shown upon the trial of this action, the verdict was supported by the evidence.

Appealable Order.

Quære: Whether an order denying a motion for judgment notwithstanding a verdict is appealable.

Appeal by defendants Lauer Bros. from an order of the district court for Ramsey county, Otis, J., denying a motion for judgment notwithstanding the verdict. Affirmed.

Morton Barrows, for appellants.

Schoonmaker & Fleming, for respondent.

COLLINS, J. Action to recover for injuries said to have been caused by defendants' negligence. At the trial the court dismissed the action as to defendants Roemer and Karst & Breher, and then the plaintiff had a verdict as against defendants (appellants) Lauer Bros. As the case is presented, the only question which needs elaboration is that raised by counsel's contention that the verdict is not supported by the evidence.

Defendant Roemer had contracted to erect a church in the city of St. Paul, and plaintiff was in his employ, as a carpenter. Roemer had sublet the necessary tin work to Karst & Breher, and the stone work to Lauer Bros., reserving to himself all of the carpenter work. When the accident occurred, Lauer Bros. were completing the stone tower or steeple, and, for the purpose of raising the materials, had attached a rope to a small platform, and then run it upwards, about 30 feet, to a block hung at the top of the tower. Passing through this block, the rope when taut descended at an acute angle, and approximately parallel with the plane of the south front of the building, to a stationary block upon the ground, a short distance

[1] Reported in 69 N. W. 893.

from the foot of the tower, and about 40 feet from the upper block. The rope ran through this stationary block, and to its end a horse was hitched, driven by one of Lauer Bros.' employés. When materials were to be hoisted the horse was driven away from the building, and the platform raised. The horse was backed up when the platform was to be lowered. Naturally, the rope was quite loose when the platform was upon the ground.

On the morning of the accident, defendants Karst & Breher put up a scaffold on the side of the building, the walk of which scaffold was a single plank, laid down on brackets. The east end of this plank projected east, beyond the south front of the building, so that, when that part of the rope running at an angle between the block at the top of the tower and the block on the ground was taut, it was about four feet above the plank, and from two to four feet west of the end which projected. When the platform was not in use, and resting upon the ground, the rope running between the blocks dropped loosely upon the plank, or might get underneath it, as it did just before plaintiff received his injuries. Karst & Breher's men were tinning a roof gutter during the forenoon, standing upon the plank, and the driver of the horse was engaged in conversation with them a number of times.

Immediately after dinner, plaintiff was directed by Roemer's foreman to fit a "slant board" into the same gutter, and went upon the scaffold, with another employé, to do the work. Shortly afterwards the driver hitched the horse to the end of the rope, and then stood immediately under the scaffold until plaintiff notified him to look out, as work was to be done there and something might fall upon him from above. This advised the driver of the presence of plaintiff on the scaffold. It was not shown just where the rope then was, but, from what resulted, it must have been in plain sight of the driver, and lying upon the ground, under the plank, which was also in plain sight. A few minutes afterwards the driver started the horse, and, as the rope was pulled away from the stationary block, it caught the underside of the plank, tipping it over and throwing both men to the ground.

Upon this state of the evidence, defendants Lauer Bros. having declined to put in any testimony, the court charged the jury that ordinary care was required of the driver of the horse, and if he

failed to observe ordinary care when operating the hoisting apparatus, taking into consideration the apparent danger to the men he knew were standing upon the plank, he was guilty of negligence for which his employers were responsible, and that if there was no apparent danger, under the circumstances, and ordinary care was exercised by the driver, he was not negligent, and plaintiff could not recover. And in this immediate connection the court further charged that if the jury should find that the driver knew, or, in the exercise of ordinary care, ought to have known, that it was dangerous to operate the apparatus without seeing that the rope was above the plank, knowing as he did that men were standing upon it and in danger of being thrown off, it became his duty to see the position of the rope, and a failure so to do constituted negligence, and plaintiff, without fault on his part, would be entitled to recover of these appellants.

The charge was correct. The plaintiff and the driver of the horse were working for independent contractors, were not fellow servants, and there was sufficient evidence to support the verdict. The question of plaintiff's contributory negligence was also for the jury, upon the facts as above stated.

At the close of the testimony, counsel for appellants moved the court to direct a verdict in favor of his clients, and this the court declined to do. He thus brought the case within the provisions of Laws 1895, c. 320. Subsequently, upon a settled case, counsel moved for judgment notwithstanding the verdict, and the present appeal is from an order denying this motion. Respondent's counsel have not questioned the appealability of such an order, and we have disposed of the case on its merits. But we do not wish to be understood as holding that such an order is appealable, for it is a debatable question.

Order affirmed.

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FRANCIS ROGERS v. PHILIP H. GROSS and Others.[1]

January 18, 1897.

Nos. 10,317—(263).

Corporation—Subscription to Stock—G. S. 1894, § 3415.

Under the provisions of G. S. 1894, § 3415, an agreement entered into by the subscribers for stock shares in a corporation that, for each share paid for, a certificate for two or more shares shall be issued to the shareholders, is forbidden, is nonenforceable and void.

Same—Equitable Rights.

No equitable rights of the creditors of an insolvent corporation can be based upon the bare fact that such an agreement has been entered into, in an action to enforce the double liability of stockholders. Nor have stockholders who have accepted certificates issued in accordance with such an agreement any equitable rights, as against other subscribers who have paid for their stock, but have not applied for or received certificates, which may be enforced in such an action.

Same—Liability of Stockholders.

It was verbally agreed between all of the subscribers, except one, for stock shares in a corporation, that, for each share paid for, a certificate for five shares should be issued and delivered to the subscribers. Some of the subscribers paid for shares, and received certificates in accordance with this agreement, which certificates were signed by G., as president of the corporation. G. paid for the shares he had subscribed for, but did not take a certificate. The corporation subsequently became insolvent, and, in an action to enforce the double liability against the stockholders, it is *held* that G. is only liable in an amount equal to the par value of his shares actually subscribed for, and is not liable to an amount equal to five times their par value.

Appeal by defendant Gross from an order of the district court for Morrison county, Searle, J., denying a motion for a new trial. Modified.

George W. Stewart, for appellant.

This is an action to enforce the so-called double liability of stockholders. The provision of the constitution creates an individual liability of the stockholder. McKusick v. Seymour, 48 Minn. 158,

[1] Reported in 69 N. W. 894.

50 N. W. 1114. The complaint alleges an assignment to the plaintiff for a valuable consideration of the judgment against the corporation mentioned in the complaint. The amount of the consideration is not disclosed, nor whether plaintiff is seeking to speculate upon the liability of the defendants. The law will not permit speculation upon such a liability. While the original creditor may recover the full amount of his debt, his assignee, if he can recover at all, can recover only enough to indemnify him against loss. It is compensation and not fulfilment of a legal obligation that is covered by the constitutional provision. Hospes v. Northwestern M. & C. Co., 48 Minn. 174, 50 N. W. 1117; Wilson v. St. L. & W. R. Co., 120 Mo. 45, 25 S. W. 527; Kitchen v. St. Louis, K. C. & U. Ry. Co., 8 Am. Corp. Cas. 199; Cook, Stockh. 660.

The court erred in admitting in evidence the alleged subscription paper. The relation of stockholder can only be established by showing a stock subscription accepted by the company, or showing a direct contract with the company. The only competent evidence of ownership of stock would be either a certificate or the books of the company. Oral evidence was not competent to prove the agreement to issue bonus stock because there was no note or memorandum of the contract. A contract for sale of corporate stock, when no memorandum is made, no stock issued and no payment made upon it, is within the statute of frauds, G. S. 1894, § 4210, and is void. Tisdale v. Harris, 20 Pick. 9; Baltzen v. Nicolay, 53 N. Y. 467; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430; Fine v. Hornsby, 2 Mo. App. 61; Colvin v. Williams, 3 Harr. & J. (Md.) 38; Southern L. I. & T. Co. v. Cole, 4 Fla. 359; Johnson v. Mulry, 4 Robertson, 401. There was no memorandum of the contract and no payment by Gross. Any payments made by him were made subsequently, but a payment upon an oral contract, to take it out of the statute, must be made at the time of sale, or be made with a reaffirmance of the contract at the time of payment. Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65; Hunter v. Wetsell, 57 N. Y. 375, s. c. 84 N. Y. 549; Allis v. Reed, 45 N. Y. 142. There is no evidence that the oral agreement was ratified, approved or adopted by the corporation. There was no consideration for the agreement.

The agreement was void upon the ground of public policy. Apart from statute it is the general rule that shares of corporate stock can

only be issued in the first instance for their full value. The corporation must receive an equivalent at so much per share. Upton v. Trebilcock, 91 U. S. 45; Chouteau v. Dean, 7 Mo. App. 210; Kehlor v. Lademan, 11 Mo. App. 550; Williams v. Evans, 87 Ala. 725, 6 South. 702; Zelaya Min. Co. v. Meyer, 28 N. Y. St. Rep. 759, 8 N. Y. Supp. 487; Sturges v. Stetson, 1 Biss. 246, Fed. Cas. No. 13,568; Thompson v. Reno Savings Bank, 19 Nev. 103, 7 Pac. 68; Lee v. Imbrie, 13 Ore. 510, 11 Pac. 270; Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Osgood v. King, 42 Iowa, 478; Jewell v. Paper Co., 101 Ill. 57; Joy v. Manion, 28 Mo. App. 55; Crawford v. Rohrer, 59 Md. 599; Topeka Mnfg. Co. v. Hale, 39 Kan. 23, 17 Pac. 601; Tobey v. Robinson, 99 Ill. 222; Ex parte Daniell, 1 De Gex & J. 372; West C. Ry. Co. v. Mowatt, 12 Jur. 407; Coolidge v. Goddard, 77 Me. 579, 1 Atl. 831; Oliphant v. Woodburn C. & M. Co., 63 Iowa, 332, 19 N. W. 212; Knowlton v. Congress & E. Springs Co., 57 N. Y. 518; Mann v. Cooke, 20 Conn. 188; Coleman v. Howe, 11 Am. Ry. & Corp. R. 19, 39 N. E. 725. The term "public policy" is hard to define. Courts declare that, whenever any contract conflicts with the morals of the times and contravenes the established interests of society, it is void as against public policy. Ray, Contr. Limit. 197; 2 Thompson, Corp. § 1582; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402.

The agreement in controversy contemplated (1) a fraud upon the public in reference to the assets of the company; (2) that the stock should earn excessive dividends; (3) an advantage upon incoming stockholders; and was a corrupt agreement. The contract was therefore void upon grounds of public policy. Fuller v. Dame, 18 Pick. 472; Bestor v. Wathen, 60 Ill. 138; Rue v. Missouri Pac. Ry. Co., 74 Tex. 474, 8 S. W. 533; Chippewa Valley Ry. Co. v. Chicago, St. P., M. & O. Ry. Co., 75 Wis. 224, 44 N. W. 17; Attaway v. Third Nat. Bank, 93 Mo. 485, 5 S. W. 16; Atlee v. Fink, 75 Mo. 100; Bliss v. Matteson, 45 N. Y. 22.

The constitutional liability of stockholders is created exclusively for the benefit of corporate creditors. It is not an asset of the corporation, and the corporation has no interest in it. The corporation cannot enforce it by assessment upon stockholders, nor upon insolvency assign it for the benefit of creditors. It is a liability running directly from the shareholders to the creditors of the corpora-

tion. It can only be enforced by the creditors themselves in their own right and for their own benefit. In re People's L. S. Ins. Co., 56 Minn. 180, 57 N. W. 468; Bristol v. Sanford, 12 Blatch. 341, Fed. Cas. No. 1,893; Arenz v. Weir, 89 Ill. 25; Billings v. Robinson, 94 N. Y. 415; Farnsworth v. Wood, 91 N. Y. 308; Cuykendall v. Corning, 88 N. Y. 129; Liberty F. C. Assn. v. Watkins, 70 Mo. 13; Cook, Stockh. § 218. This constitutional liability is purely statutory. Allen v. Walsh, 25 Minn. 543; Canal & M. Co. v. Woodbury, 14 Cal. 265; Neilson v. Crawford, 52 Cal. 248; Sonoma V. Bank v. Hill, 59 Cal. 107; Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62; Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Parrott v. Colby, 6 Hun, 55. The rule is otherwise in federal courts upon cases arising under the national bank act, but this act expressly declares the liability of executors and administrators and is enforcible by the receiver for the benefit of creditors. The authorities warrant the assertion that this constitutional liability is purely statutory, belongs to the creditors and does not survive the death of the stockholders. It is an original and not a secondary liability. In other words the stockholders are original debtors and not guarantors or sureties. Middletown Bank v. Magill, 5 Conn. 28; Moss v. Oakley, 2 Hill, 265; Moss v. Averell, 10 N. Y. 449; Culver v. Third Nat. Bank, 64 Ill. 528; Hawthorne v. Calef, 2 Wall. 10.

The constitutional liability is therefore a liability purely personal and not assignable. It arises purely by operation of law and is analogous to a vendor's lien, which is not assignable. Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; Law v. Butler, 44 Minn. 482, 47 N. W. 53. Hence an assignment of the debt will not convey an assignment of this liability.

A director or stockholder in a corporation cannot make profit at the expense of the company or of its other stockholders. If he buys in a claim against it, it is entitled to the benefit of the purchase. Thompson v. Meisser, 108 Ill. 359; Abbey v. Long, 44 Kan. 688, 24 Pac. 1111; Smith v. Mosby, 9 Heisk. 501; Lingle v. National Ins. Co., 45 Mo. 109; Bulkley v. Whitcomb, 121 N. Y. 107, 24 N. E. 13; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Kitchen v. St. Louis Ry. Co., 69 Mo. 224; Balch v. Wilson, 25 Minn. 299. If a stockholder individually liable to creditors buys any claims against the company

at a discount, he can only claim a discharge to the amount paid by him. Thompson v. Meisser, supra; Abbey v. Long, supra.

Lindbergh, Blanchard & Lindbergh, for certain respondents.

The case of Holland v. Duluth I. M. & D. Co., 65 Minn. 324, 68 N. W. 50, is conclusive that Gross was a stockholder. He is also liable on bonus stock the same as the other stockholders. The agreement was accepted by the company. The statute of frauds does not apply to contracts of purchase of stock in a corporation not yet formed. 23 Am. & Eng. Enc. Law, 594. The original stock subscription is a contract. Minneapolis T. M. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026; 23 Am. & Eng. Enc. Law, 789.

There is nothing in the language of the constitution which supports appellant's claim that this liability cannot be enforced by an assignee of it. The liability survives against the representatives of a deceased stockholder. Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788; Irons v. Manufacturers' Nat. Bank, 21 Fed. 197; Chase v. Lord, 77 N. Y. 1; Beach, Priv. Corp. 135, and cases cited on page 136. Cases under the national bank act were not decided upon the theory indicated by appellant. See Richmond v. Irons, supra; In re Martin, 56 Minn. 420, 57 N. W. 1065. The liability is contractual. Hawthorne v. Calef, 2 Wall. 10; Thompson, Liab. Stock. 25; Day v. Vinson, 78 Wis. 198, 47 N. W. 269; Beach, Priv. Corp. 24, 146. When such liability is created as a punishment, it is sometimes held to be penal. When a statute establishes a liability in favor of a particular class of persons, it has been contended that such liability was a personal privilege and could not be transferred, but the courts hold otherwise. Day v. Vinson, supra; 3 Thompson, Corp. § 3143; Reading Ind. Mnfg. Co. v. Graeff, 64 Pa. St. 395; Pilcher v. Brayton, 17 Hun, 429; Beach, Corp. 158; Krauser v. Ruckel, 17 Hun, 463; Bonnell v. Wheeler, 1 Hun, 332.

The assignment of a demand entitles the assignee to every assignable remedy, lien or security available by the assignor as a means of indemnity or payment, unless expressly excepted from or reserved in the transfer. Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. 879; Moosbrugger v. Walsh, 35 N. Y. Supp. 550; Lowry v. Inman, 46 N. Y. 119; Flash v. Conn, 16 Fla. 428; Appeal of Hammond, 123 Pa. St. 503, 16 Atl. 419; Craig's Appeal, 92 Pa. St. 396;

Oneida Bank v. Ontario Bank, 21 N. Y. 490; Cook, Stockh. 218, and note; Woodruff & B. I. W. v. Chittenden, 4 Bosworth, 406; American F. Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90; Potter v. Stevens M. Co., 127 Mass. 592.

Calhoun & Bennett, for other respondents.

As between the corporation and its stockholders, the agreement to issue shares for less than their par value is valid. Hospes v. Northwestern M. & C. Co., 48 Minn. 174, 50 N. W. 1117. The only persons who can complain are the creditors. Winston v. Brooks, 129 Ill. 64, 21 N. E. 514; Sawyer v. Hoag, 17 Wall. 610; 2 Thompson, Corp. § 1590; First National Bank v. Gustin M. C. M. Co., 42 Minn. 327, 44 N. W. 198. See Scoville v. Thayer, 15 Otto, 143. The issue of a certificate of stock is not necessary to constitute one a stockholder. Pacific Nat. Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984; American P. I. S. Co. v. State Board, 56 N. J. Law, 389, 29 Atl. 160; Barron v. Burrill, 86 Me. 66, 29 Atl. 939; Marson v. Deither, 49 Minn. 423, 52 N. W. 38.

The liability of a stockholder is contractual. Hawthorne v. Calef, 2 Wall. 10; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Wiles v. Suydam, 64 N. Y. 173; Norris v. Wrenschall, 34 Md. 492; Erickson v. Nesmith, 46 N. H. 371; Corning v. McCullough, 1 N. Y. 47; Coleman v. White, 14 Wis. 700; Lowry v. Inman, 46 N. Y. 126; Paine v. Stewart, 33 Conn. 516; Bond v. Appleton, 8 Mass. 472, 5 Am. Dec. 111; Hutchins v. New England C. M. Co., 4 Allen, 580; Grand Rapids Savings Bank v. Warren, 52 Mich. 557, 18 N. W. 356; Hodgson v. Cheever, 8 Mo. App. 328; Manville v. Edgar, 8 Mo. App. 324; Freeland v. McCullough, 1 Denio, 414, 43 Am. Dec. 685; Aultman's Appeal, 98 Pa. St. 505; Sackett's Harbor Bank v. Blake, 3 Rich. Eq. 225; Woods v. Wicks, 7 Lea. 40; Note to United States v. Stanford, 161 U. S. 412, 40 L. C. P. page 751.

COLLINS, J. Action to enforce the double liability of stockholders in a corporation. Gross, the only appellant, had subscribed for 20 shares of stock, of the par value of $100 each, was the principal promoter, was the president and leading spirit of the enterprise. He paid for the shares so subscribed for, but no certificate was issued to him. The corporation became insolvent, and made an as-

signment for the benefit of its creditors. The principal controversy here is as to the legal effect of a finding of fact made by the court below, and upon which it based a conclusion of law that appellant was liable in the first instance to an amount not exceeding $10,000, five times the amount of his subscription and shares, for which sum judgment against him was ordered to be entered. With a single exception, each of the subscribing stockholders, defendants, was also held liable, because of the findings, in five times the amount of his subscription.

This finding was, in effect, as follows: That, prior to the issuance of any of the stock certificates, it was mutually agreed between all of the defendants, with the exception before mentioned, and the corporation, that, for each share of stock subscribed and agreed to be taken, a certificate for five shares of the stock for each one paid for should be issued, and that several of the defendants received and accepted certificates of this character, relying upon the agreement, and with the understanding that all should receive and accept certificates representing five times the amount of stock subscribed and paid for. From the evidence it appeared that the agreement between the stockholders rested in parol, and, if acted upon by the corporation, it was at a meeting where, according to the minutes (the only evidence), it was resolved that the board of directors be "directed to call the first assessment on stock at once of twenty-five per cent., all stock to be issued fully paid upon payment of twenty per cent. of face value, to be called in four equal instalments."

We are of the opinion that there is nothing in this language, whatever it may mean, which shows that the corporation acted in any manner upon the verbal agreement said to have been entered into by and between the shareholders. It was also proven upon the trial that Gross, as president, signed all certificates issued in pursuance of the agreement.

It is claimed by appellant's counsel that this agreement cannot be enforced against him, because it was not in writing, is within the statute of frauds,[2] and that the acceptance of certificates by some of the defendants, in accordance with it, was not part performance sufficient to take it out of the statute. As we regard the

[2] G. S. 1894, § 4210.

case, it is not necessary for us to determine whether this was an agreement within the statute, or merely a contract between the stockholders to enter into personal relations with each other. The agreement itself was forbidden by law, was nonenforcible and void. If so, no equitable rights of creditors or other stockholders could be founded upon the bare fact that it had been entered into. No equitable rights based upon it could be enforced, except, perhaps, by corporate creditors against such stockholders as had actually received and accepted certificates for what may be called "bonus" or "watered" stock, and that question is not before us on an appeal taken by Gross alone.

By G. S. 1894, § 3415, it is provided that:

"Corporations having capital stock divided into shares, unless specially authorized, shall not issue any shares for a less amount to be actually paid in on each share than the par value of the shares first issued" * * *;

And this was exactly what these defendants undertook to do when they verbally agreed to issue five for one. They attempted to perform an act prohibited by statute, and void. While the prohibition is not as directly expressed as it might be, the intent of the legislature is plain, and public policy requires that the language of the statute be given full force. If this is not done, an opportunity is afforded to stockholders in corporations to defraud the public by placing upon the market shares which they have obtained for nothing, and which represent no real capital,—nothing of actual value. The statute was enacted for the government and good conduct of the shareholders themselves, as well as for the benefit and protection of the public, on the general grounds of expediency; and it must receive a construction which will render it effective.

But it is argued that as to those defendants who have received their stock certificates relying upon the illegal agreement, Gross is estopped, and that, as those defendants have been concluded as to creditors, he cannot escape a like liability. But other stockholders are not innocent parties. They were wrongdoers, as well as Gross, and, as between wrongdoers, the doctrine of estoppel is unknown.

And it is also argued that the creditors of the corporation may invoke this doctrine. But, to permit this, we should have to allow these creditors to enforce an equity based upon an agreement for-

bidden by the statute, not acted upon by Gross, nor relied upon by them. He never took a certificate for any stock, and there was no evidence, nor was there any finding, that the creditors had any knowledge of this agreement. Certainly, they did not rely upon it when giving credit to the corporation. And even this knowledge, if they had it, would be accompanied by notice that the agreement was illegal and void,—a direct violation of the statute. We again call attention to the fact that we are not considering the rights of creditors where, in pursuance of an unlawful agreement, stock certificates have been actually issued to and accepted by shareholders.

The court below erred in its conclusion of law that, in the first instance, plaintiff was entitled to judgment against Gross in an amount not exceeding $10,000; but, as the findings of fact are full and complete as to the number of shares owned by him, a new trial is unnecessary.

It is ordered that, when the cause is remanded, the conclusion referred to be amended so that, in the first instance, judgment against Gross shall not be entered for an amount exceeding $2,000, and the order appealed from is modified to this extent.

EAGLE ROLLER-MILL COMPANY v. G. C. DILLMAN and Others.[1]

January 19, 1897.

Nos. 10,135—(89).

Principal and Surety—Purchase of Grain—Weights and Measures.

Action against the sureties on a bond, given by an agent to buy grain, conditioned that he would, on demand, deliver or account for all grain purchased by him for his principal, and pay over all moneys in his hands belonging to him; the breach alleged being that he had failed, on demand, to deliver or account for the grain purchased by him, or to pay over the money in his hands furnished him by the principal for the purpose of buying grain. *Held*, that the fact that the principal, in the conduct of the business, used and furnished for the use of his agent scales which had not been tested and sealed, as required by G. S. 1894, § 2205, constituted no de-

[1] Reported in 69 N. W. 910.

fense in favor of the sureties. The illegal act alleged—the use of unsealed scales in weighing the grain—constituted no link in the plaintiff's chain of title to the grain or the money, or any part of his cause of action. Neither was the plaintiff dependent upon it for the purpose of establishing his claim.

Appeal by defendants McBain and another from an order of the district court for Brown county, Webber, J., sustaining a demurrer of plaintiff to one of the defenses set up in their answer. Affirmed.

John Lind, for appellants.

Somerville & Olsen, for respondent.

MITCHELL, J. Summarized, the material allegations of the complaint are that the plaintiff, being about to employ the defendant Dillman as its agent to purchase, sell, and handle wheat and other personal property at a place called "Cobden," and to furnish him money, grain, and other property for that purpose, Dillman, as principal, and the other defendants, as sureties, executed to plaintiff a bond, conditioned that, in the performance of his duties as such agent, he would, among other things, not sell, pledge, or dispose of any wheat or other property purchased for the plaintiff, or with its money, without its direction; that he would at all times keep on hand the full amount of wheat and other property which his reports showed on hand, and on demand deliver the same to plaintiff, and pay over all moneys in his hands belonging to the plaintiff, and pay to it all debts or demands due from him to it on any account whatever; that, upon the security of this bond, the plaintiff employed Dillman as its agent for the purposes aforesaid from April, 1891, to April, 1895. The complaint then alleges specifically a breach of each of the conditions of the bond, and especially that Dillman bought for the plaintiff, and with its money, a certain number of bushels of wheat, but has only accounted for or delivered a certain less number of bushels, and has failed and refused to deliver or account for the balance on demand; that his reports show in his hands a balance of over 8,000 bushels which he has failed and refused to account for; that there remains in his hands over $3,800 in money, belonging to the plaintiff, which he has failed and refused to pay over on demand.

The sureties interposed the following defense, among others, to wit, that the business and service for which plaintiff employed Dill-

man, and in which he was actually employed, required the use of weights and measures for weighing and measuring grain and other commodities bought, shipped, and stored by him for plaintiff; that, at the time they executed the bond, they assumed and believed that plaintiff would employ Dillman in a lawful business, but that, in fact, without their knowledge or consent, the plaintiff set up and used in its warehouse, where Dillman was employed, scales and weights, for weighing grain and other commodities,—and which were, in fact, used by Dillman in weighing all the grain, etc., by him bought for, stored, and shipped out for plaintiff,—which had never been proved and sealed by the sealer of weights and measures, as required by G. S. 1894, § 2205. To this defense the plaintiff demurred, and from an order sustaining the demurrer the sureties appealed.

The statute referred to provides that all persons engaged in any business requiring the use of weights and measures shall cause to be tried, proved, and sealed by the sealer of weights and measures in their respective counties, all scale beams, steelyards, weights or measures used by them in buying or selling any goods, wares, merchandise, grain or other commodities; that any person who shall buy, sell, or dispose of any such property by any scale beams, etc., which have not been proved and sealed in accordance with the statute, shall be deemed guilty of a misdemeanor, and, upon conviction, be fined not less than $5 or more than $100, and stand committed to the county jail until the fine is paid or he is discharged by due course of law. The facts alleged in the answer would constitute no defense as to Dillman, the principal on the bond. The grain and money having come into his possession as plaintiff's agent, his possession was its possession, and he would not be heard to justify his refusal to deliver the property to the owner, or his embezzlement of it, on the ground that the owner had been guilty of some unlawful act in the manner of conducting the business.

The question is, do these facts constitute a defense in favor of the sureties? It will be observed that they do not allege any injury or prejudice to themselves resulting from the use of unsealed scales, but "stand pat" on the bare fact that such scales were used in the business in violation of the statute. It will also be observed that it is not alleged that the contract of employment and the bond were

illegal, or provided for or contemplated the doing of anything illegal. They were perfectly valid. The only thing that was illegal was the subsequent use of unsealed scales in the transaction of the business which was the subject of Dillman's agency. That business was lawful. The plaintiff had a right to engage in it without obtaining a license or the performance of any other act as a condition precedent. The only thing prohibited was the use of unsealed scales in carrying on the business. This illegal act does not form any link in plaintiff's chain of title to the grain or the money, or constitute any part of its cause of action. Neither is the plaintiff dependent on it for the purpose of making out its claim against the defendants. This, we think, furnishes the correct test whether the illegal act alleged constitutes a defense. Gregg v. Wyman, 4 Cush. 322.

It seems to us that the case stands exactly as if the defendants had alleged that plaintiff had embezzled the money which it gave its agent with which to buy grain, or that it cheated by means of false weights those from whom the grain was bought. The facts alleged constitute no defense in favor of the sureties any more than they would in favor of the principal.

The cases chiefly relied on by counsel for the defendants are Daniels v. Barney, 22 Ind. 207, and Thorne v. Travellers' Ins. Co., 80 Pa. St. 15, both of which are, in our judgment, distinguishable from the case at bar. In both of these cases the plaintiffs had engaged in a business which was prohibited by statute, except by those who had first obtained a license or complied with other requirements of the statute. This the plaintiffs had not done. They could not recover without the aid of this illegal business, which formed a necessary link in their chain of title. The decision in Thorne v. Travellers' Ins. Co. is put substantially on this ground, although the court does not refer to the distinction which we have attempted to make. In Daniels v. Barney, the transaction contemplated by all parties at the time the bond was executed was an illegal one, and hence the bond was void ab initio. The court seems to place its decision, first, on this ground, and then proceeds to add another or second ground, in which they use the language relied on by counsel. Nowhere in the opinion is the point expressly or directly made that the illegal business was a necessary link in plaintiffs' title, without which they could not make out a cause of action.

Whether it would be competent for the plaintiff, on the trial, to prove the amount of wheat received by the agent, by evidence of weights ascertained by the use of unsealed scales, is a question not before us, and upon which we express no opinion.

Order affirmed.

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BOARD OF COUNTY COMMISSIONERS OF REDWOOD COUNTY v. CITIZENS' BANK OF REDWOOD FALLS and Others.[1]

January 19, 1897.

Nos. 10,139—(88).

County Depositary — Bond — Liability of Sureties — Application of Payments.

A bank which had been depositary of county funds for one term, about to expire, and which was indebted to the county for money deposited with it during that term, was designated depositary for a second term, and gave to the county a bond, with sureties, conditioned that it would pay on demand all funds "which shall be deposited in said bank pursuant to said designation." The account between the bank and the county was kept in the form of one open current account. During the second term, from time to time, deposits were made to the credit of the county, and payments made generally to the county on its checks; the amount of these payments during the second term exceeding the amount of the deposits during the same time, leaving a balance still due the county when the bank failed during the second term. *Held*, that the sureties were only liable for money deposited during the second term for which their bond was given, but that the relation between the bank and the county was that of debtor and creditor, and that the money deposited with the bank became its property, and all payments made by it to the county were made with its own funds; and, having been paid generally on a single continuous account, the law will appropriate them according to the general rule, viz. the first item on the credit side to discharge or reduce the first item on the debit side; that the sureties have no right to have the payment first applied to discharge the debits created by deposits made during the second term. The case distinguished from those on official bonds where the officer was merely the

[1] Reported in 69 N. W. 912.

custodian of public funds, which remained the property of the public, and where he used the public funds which came into his custody during one term to discharge his liability on account of an embezzlement committed by him during a previous term.

Appeal by plaintiff from an order of the district court for Redwood county, Webber, J., denying a motion for a new trial. Reversed.

H. W. Childs, Attorney General, *George B. Edgerton*, Assistant Attorney General, *Arthur M. Wickwire*, and *Frank Clague*, for appellant.

The general rule as to the appropriation of payments upon a running account applies. Clayton's Case, 1 Mer. 584; Munger, Applic. Paym. 102; Lash v. Edgerton, 13 Minn. 197 (210); Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590; Jefferson v. Church, 41 Minn. 392, 43 N. W. 74; Winnebago P. M. Co. v. Travis, 56 Minn. 480, 58 N. W. 36; Sheppard v. Steele, 43 N. Y. 52; Smith v. Loyd, 11 Leigh, 512; Howard v. McCall, 21 Grat. 205; Hammer v. Rochester, 2 J. J. Marsh. 144; Milliken v. Tufts, 31 Me. 497; Bean v. Brown, 54 N. H. 395.

B. H. Schriber and *Somerville & Olsen*, for respondents.

The question here is not so much one of the application of payments as one of the construction of the obligation of sureties. The obligation of a surety is strictissimi juris. Detroit Savings Bank v. Zeigler, 49 Mich. 157, 13 N. W. 496; Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Brandt, Sur. § 93; Mechem, Pub. Off. §§ 282, 286, 291, 292; State v. Medary, 17 Ohio, 555; Lang v. Pike, 27 Ohio St. 498.

The sureties are not chargeable if all the funds received during the second term have been accounted for. County v. Willard, 39 Minn. 125, 39 N. W. 71; Bissell v. Saxton, 66 N. Y. 55; Kellum v. Clark, 97 N. Y. 390; County v. Hutchinson, 60 Iowa, 724, 9 N. W. 901; Mann v. Yazoo City, 31 Miss. 574; U. S. v. Eckford's Execs., 1 How. 258; Lowry v. Hull, 64 Ind. 421; County of Mahaska v. Ingalls, 16 Iowa, 81; Vivian v. Otis, 24 Wis. 518; District Tp. of Milford v. Morris, 91 Iowa, 198, 59 N. W. 275; Inhabitants v. Randall,

105 Mass. 295; Peoria & P. U. Ry. Co. v. Buckley, 114 Ill. 337, 2 N. E. 179; Stern v. People, 96 Ill. 475; Board v. Fonda, 77 N. Y. 350.

MITCHELL, J. This action was brought on a bond given May 2, 1894, by the defendant bank as a depositary of county funds, pursuant to the provisions of G. S. 1894, §§ 730, 731. The bond, after reciting that the bank had been duly designated as a depositary of the funds of the county for the term of two years from the date thereof, and had agreed to pay interest thereon at 2 per cent. per annum on monthly balances, was conditioned that it—

"Shall well and truly credit such interest on such monthly balances to said county, and shall well and truly hold such funds, with accrued interest, subject to draft and payment at all times on demand, and shall well and truly pay over on demand, according to law, all of said funds which shall be deposited in said bank pursuant to said designation and said statutes aforesaid, and all of the interest so to be credited."

During the life of the bond the bank became insolvent, and made an assignment for the benefit of its creditors. At this time it was indebted to the county for county funds deposited with it in the sum of $3,642.74, which, not having been paid on demand, is sought to be recovered from the sureties on the bond. The court directed a verdict in favor of the sureties upon the evidence, which disclosed the following state of facts: The bank had been designated depositary of county funds for the two years immediately preceding, and as such was indebted to the county in the sum of $5,341.79 for moneys deposited with it during that term. This first term being about to expire, and a second term, under a new designation, about to begin, for which a new bond was to be executed, the county treasurer and the officers of the bank made an arrangement by which the former drew his check on the bank for the amount of this balance, and received in exchange therefor a draft on New York for an equal amount, with the understanding that he should never present or forward it for payment, but should hold it until after the new bond was delivered and approved, and then redeposit it to the credit of the county. Defendant bank had no funds in the hands of the drawee with which to meet this draft, and as a matter of fact, if it had been presented for payment, it would have been dishonored.

This arrangement was carried out, and on May 9 the county treasurer returned the draft to the bank, which credited the county with the amount as a deposit of that date of so much money.

The account of the county was kept in the form of an open account, the same as that of any depositor, except, of course, that monthly balances were struck for the purpose of computing the interest to be credited to the county. Subsequently, from time to time, the county made deposits aggregating $14,618.16, and during the same time drew out various sums aggregating $16,317.21, leaving the balance due the county (including the $5,341.79) at the time the bank failed, $3,642.74. It will be observed that, if the $5,341.79 is excluded, the county drew out more than it deposited during the term for which the bond in suit was given. It is upon this fact that the sureties rest their contention that the condition of their bond has been fully performed. Their position is that under the terms of the bond they are only liable for funds "which shall be deposited in said bank pursuant to said designation,"—that is, during the two years from and after the date of the bond,—and not for moneys deposited during the first two years; that for such funds the sureties on the first bond are liable.

This question was expressly reserved in Board of Commrs. of St. Louis Co. v. American Loan & Trust Co., supra, p. 112, 69 N. W. 704, but we think the contention of the defendants is correct. The language of the bond itself would seem to be decisive of this question. The statute is entirely silent as to what the conditions of the bond shall be. It merely provides that all such bonds shall be given for the term of two years from their date, and shall be renewed every two years. The form of bond adopted in this case seems to have been in general use throughout the state for years, and presumably was prepared by some department of the state government. Our conclusion is that under a bond of this form the sureties are liable only for funds deposited with the bank during the term for which the bond was given, but that they continue liable for such funds until they are paid, although payment may not be demanded until after such term has expired.

The next contention of the defendants is that the arrangement between the bank and the county treasurer, by which the latter accepted the draft on New York, held it, and then deposited it, amount-

ed to nothing, and in no way affected the respective rights or obligations of either the county, the bank, or the sureties. This we think is also correct. The original debt of the bank to the county remained the same as if no such mere paper formalities had been resorted to. When these paper transactions were completed on May 9, the sureties on the bond in suit were no more liable for this $5,341.79 than they were before.

The further and last contention of the defendants' counsel is that the general rule as to the appropriation of payments has no application to the case as against them; that the county cannot insist on any of the payments made by the bank during the term of the bond being applied towards satisfying this balance due for money deposited during the previous term, but, on the contrary, that they are entitled to have all such payments treated as having been made on account of funds deposited during the current term, and hence, as such payments exceed the amount deposited, the condition of the bond has been satisfied. Here, in our opinion, is the fallacy in counsel's argument.

The cases cited by them in support of their position were on official bonds, where the principal was a mere custodian of public funds, which he was bound to keep intact, and to pay over to the government or municipality whose officer he was, which continued during all the time to be the owner of the money. He could not use it for any other purpose without a violation of duty. Hence he had no more right to use public moneys which came into his official custody during one term to discharge his liability on account of an embezzlement committed by him during the previous term, than he had to use it to pay any other debt which he owed. To pay such a defalcation out of accruing receipts during a subsequent term would be a fraud upon the sureties for such term. The money in the hands of such an official is not his money, but the money of the public. U. S. v. Eckford's Exrs., 1 How. 250, which grew out of the noted Swartwout defalcations, is a leading case on the subject, and states the rule and the reasons for it as well as they are stated anywhere.

But the relations of a bank to the county and to the funds deposited with it under this statute are entirely different. The relation between the bank and the county is that of debtor and creditor, the same as between it and any other depositor. The money deposited does not remain the property of the county, but becomes the

property of the bank, which it has a right to lend or use in any other way it sees fit. This right is implied from the fact, if from nothing else, that the bank is to pay interest on the money. When the bank pays out money on the check or draft of the county, it is using its own money, and not that of the county; in other words, it is merely paying its debt with its own funds. It is never in default until payment is demanded by the county and refused. If a bank is designated as a depositary for two or more successive terms, while the time is, as respects liability of the sureties on the different bonds, deemed divided into different terms, yet, as between the bank and the county, there is the uninterrupted relation of debtor and creditor during the whole time on one continuous account. When payments are made on that account, the sureties have no right, either in law or equity, to control the appropriation of them, or to require that they shall be applied on deposits made under their bond.

In their last analysis, the facts, according to their legal effect, are that, upon a mutual current account, the bank has, during the term of this bond, made payments, with its own money, on its indebtedness to the county, amounting in the aggregate to more than the amount of the new indebtedness which it has contracted on the same account during the same time. The money with which such payments are made is the money of the bank, which it may apply as it chooses; and, this being so, then, by a parity of reasoning, if it is paid generally without any express stipulation or arrangement between it and the county, the law will apply it on the account according to the priority of time; that is, the first item on the debit side of the account is discharged or reduced by the first item on the credit side. Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 74. There is nothing in the facts to take the case out of this general rule as to the application of payments. The result is that the $5,341.79 due on the account at the end of the first term has been fully discharged by the subsequent payments, and the balance of $3,642.74, due when the bank failed, is properly referable and chargeable to moneys deposited during the second term, for which the defendants are liable on their bond. Hence the court erred in directing a verdict in their favor.

Order reversed, and new trial ordered.

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J. C. EASTON v. EDWARD P. CHILDS.[1]

January 19, 1897.

Nos. 10,157—(100).

Publication of Summons—Return of Sheriff.

Under G. S. 1894, § 5204, the filing of the return of the sheriff is not a jurisdictional prerequisite to the publication of the summons. Corson v. Shoemaker, 55 Minn. 386, overruled.

Same.

Under the statute, the office of a return of the sheriff that the defendant cannot be found is, not to authorize the publication, but to support it after it is made, being prima facie evidence that the case was one where service by publication was authorized, to wit, where the defendant could not be found in the state.

Appeal by plaintiff from an order of the district court for Faribault county, Severance, J., vacating a judgment in favor of plaintiff. Reversed.

Kingsley & Shepherd, for appellant.
Little & Nunn, for respondent.

MITCHELL, J. This was an action to determine adverse claims to real estate. The summons was served on the defendant, a nonresident, by publication, and the plaintiff had judgment by default. The defendant subsequently moved to have the judgment annulled and vacated as being void because the sheriff's return on the summons that the defendant could not be found in his county was not filed until the day the judgment was entered. The court granted the motion, following Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134, and from that order plaintiff appealed.

If Corson v. Shoemaker is to be adhered to, it is conceded that the action of the trial court was correct; but we are asked to reconsider the question, it being claimed that the construction which we placed upon the provisions of G. S. 1894, § 5204, is not only incorrect, but also contrary to the general understanding of the bar of the state; and that, if adhered to, will render absolutely void many judgments upon which depends the title to real estate, or, as in divorce cases, the

[1] Reported in 69 N. W. 903.

status of parties. If what is claimed as to the understanding of the bar and the consequences of our ruling is true, it constitutes a good reason why the question should be carefully reconsidered, and Corson v. Shoemaker overruled, if erroneous, or even if the statute is reasonably susceptible of another construction. This would be all the more permissible in the contingency last suggested, for the reason that, so far as we can discover, the filing of the sheriff's return before publication of the summons subserves no practical purpose; and, if it is a jurisdictional prerequisite to publication, it is merely because the statute makes it such. The statute reads as follows:

"When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action is brought that the defendant cannot be found in the county is prima facie evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state or cannot be found therein, and that he has deposited a copy of the summons in the post office directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases." * * *

As a result of a somewhat careful inquiry, we have become satisfied that until the decision of Corson v. Shoemaker, the prevailing impression of the bar was that the filing of the sheriff's return was not a jurisdictional prerequisite to the publication of the summons, but that careful practitioners generally filed it out of abundance of caution, although there were many attorneys who did not, whose judgments would consequently be void under the doctrine of that case. Upon a fuller examination of the question, some reasons have suggested themselves to us why our former construction of the statute was erroneous, or at least of doubtful accuracy. The history of the statute confirms this view.

Prior to 1864 all that was required as a condition precedent to the publication of a summons was an order of the court or judge, which he might grant when it was made to appear by affidavit to his satisfaction that the defendant, after due diligence, could not be found within the territory (state). Pub. St. 1858, c. 60, § 54. Presumably in view of the strict construction placed on this section in Mackubin v. Smith, 5 Minn. 296 (367), the legislature in 1864 amended it so

that all that was required to authorize the publication of a summons was the filing of an affidavit stating certain things, no order of publication being necessary. Laws 1864, c. 42. The revision of 1866 (where the clause referring to the sheriff's return first appeared) restored the requirement of an order of publication, but the office of the return of the sheriff, as well as of the affidavit of the party or his attorney presented to the court or judge, was to satisfy him that the defendant could not be found in the state; and doubtless the return of the sheriff was made prima facie evidence of that fact, in view of the strict construction placed on the statute in force prior to 1864. The statute of 1866 contained no provision for filing either the sheriff's return or the affidavit. G. S. 1866, c. 66, § 49. This statute was amended in 1869 [2] so as to do away with the necessity of any order of publication, the only other material change being to provide for the filing of the affidavit instead of presenting it to the court or judge. The clause as to the sheriff's return was retained without change. G. S. 1878, c. 66, § 64. No prior statute had required the filing of the sheriff's return before publication, and it is fair to assume that, if the legislature had intended to make so radical a change in the practice, they would have expressly so provided, and not left it a matter of mere inference from ambiguous language. Moreover, as the statute expressly provides for the filing of the affidavit, but is silent as to filing the sheriff's return, we think the maxim that "the expression of one thing is the exclusion of another" is applicable.

Under the existing statute, the sheriff's return cannot be intended as the basis of any action of the court, for no order of publication is necessary. If it is intended (which we do not think) to be the basis upon which the party or his attorney may make the affidavit required by the statute, there is no reason why it should be filed before publication. Under the statute in its present form, in our opinion the only office of the sheriff's return is, not to authorize the publication, but to support and sustain it after it has been made, being prima facie evidence that the case was one where service by publication was authorized. If this is its purpose, it is apparent that this will be subserved as well by filing it on the entry of judgment as before publication. We do not think that there is much, if any, force in the argument based upon the definition of the word "return." We con-

[2] Laws 1869, c. 73, § 1.

cede that technically and literally that word, as applied to a writ (which a summons, under our practice, is not), includes not only the certificate of the sheriff, but also the filing of it in court. But frequently in statutes, and usually in common speech, the word "return" means merely the certificate, without regard to whether it has been filed or not.

There is still another reason why Corson v. Shoemaker should not be followed. While that was the first direct decision on the construction of this statute, yet in several prior decisions (to which our attention was not called on the argument of that case) this court, impliedly at least, assumed that all that it was necessary to file before publication was the statutory affidavit. Barber v. Morris, 37 Minn. 194, 33 N. W. 559; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315. Attorneys might well have acted on these as expressions of the views of the court upon the construction of the statute. We therefore think that Corson v. Shoemaker should be overruled.

Order reversed.

BUCK, J., dissents.

MARCUS P. HAYNE v. METROPOLITAN TRUST COMPANY and Others.[1]

January 19, 1897.

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Nos. 10,244, 10,245—(208, 209).

Insurance Company—Exchange of Securities Deposited under G. S. 1894, § 3332—Action by Receiver.

An insurance company assigned to and deposited with the insurance commissioner certain securities in trust for the benefit of its policy holders, pursuant to G. S. 1894, § 3332. Subsequently the insurance company and the defendant trust company made an arrangement by which the former assigned to the latter these securities in exchange for other securities. The two companies then procured from the insurance commissioner a retransfer and surrender of the securities deposited with him, the insurance company substituting in place of them (but of much less value) part of the securities which it had received from the trust company, and the trust com-

[1] Reported in 69 N. W. 916.

pany depositing with the state auditor, in trust for itself, the securities thus surrendered by the insurance commissioner. The surrender by the insurance commissioner of the securities deposited with him, and the substitution of others in their place, was without the knowledge of the policy holders, and without the knowledge or approval of the state treasurer. The trust company had notice of these facts. In an action brought in behalf of all the policy holders of the insurance company for the purpose of administering and distributing the proceeds of all securities deposited with the insurance commissioner in trust for their benefit, the plaintiff was appointed receiver, with power to take possession of all such securities, and to bring such actions as might be necessary for that purpose. He then brought his action against the trust company and the state auditor to compel the delivery to him of the securities withdrawn from the insurance commissioner, and tendering a return of all the securities given by the trust company in exchange for them, which had been deposited by the insurance company with the insurance commissioner, but not those not thus deposited, but retained, by the insurance company. *Held*, that the insurance commissioner has no authority to transfer, surrender, or exchange securities deposited with him in trust for policy holders without the approval of the state treasurer in the cases and in the manner provided by G. S. 1894, § 3155; and that the attempted transfer and surrender by him was not merely voidable, but absolutely void. Hence, that this action by the receiver is not one for a rescission, and that the rules governing such actions have no application. He is not required to make good to the trust company that part of the securities given by it in exchange which was retained by the insurance company, and has never come into his hands. All that is required of him is to do equity by returning those which have come into his possession from the insurance commissioner.

Same—Excess over Minimum Deposit.

The fact that the amount of the securities deposited by the insurance company in trust for the benefit of policy holders exceeded the minimum deposit required by statute, is not material. The excess was as fully bound by the trust as the balance.

Credit Insurance.

Laws 1881, c. 123 (G. S. 1894, §§ 3331–3337), authorizes the business of insurance against losses resulting from the insolvency of those to whom goods are sold on credit.

Jurisdiction of Court.

The court had jurisdiction of the state auditor as respects the control and disposition of this trust fund for the benefit of policy holders in which the state, as such, has no interest. Former decisions as to the control of the courts over the official acts of executive officers of the state government distinguished.

Separate appeals by plaintiff from an order of the district court for Hennepin county, Russell, J., sustaining the demurrer of defendant Dunn to the complaint, and by defendant Metropolitan Trust Company from an order overruling its demurrer to the complaint. Reversed as to plaintiff and affirmed as to the trust company.

V. J. Welch and *C. J. Rockwood*, for plaintiff appellant.

Wilson & Van Derlip, for appellant Trust Co.

H. W. Childs, Attorney General, for respondent Dunn.

MITCHELL, J. Two demurrers to the complaint were interposed, —one by the Metropolitan Trust Company (which we shall hereafter call the "Trust Company") on the ground that it did not state a cause of action; and the other by the state auditor, Dunn, on the same ground, and on the further ground that the court had no jurisdiction of him. The court overruled the demurrer of the trust company, and sustained that of Dunn on the second ground.

The essential allegations of the complaint, stated briefly and according to their legal purport, were as follows: The National Credit Insurance Company (which we shall hereafter call the "Insurance Company") was a domestic corporation engaged in the business of insuring against losses resulting from the insolvency of those to whom the insured had sold goods on credit. In February, 1893, pursuant to G. S. 1894, § 3332, it assigned to and deposited with the insurance commissioner, in trust for the benefit of its policy holders, a note and mortgage executed by one Maxcy, for the amount and of the actual value of $114,000. Subsequently, during the years 1893, 1894, 1895, it issued a large number of policies, upon which it was at the time of its failure, in September, 1895, and still is, indebted to the holders over $125,000.

In January, 1895, without the knowledge of the policy holders, the insurance company and the trust company (which had knowledge of all the foregoing facts) made and carried into effect an agreement by which the former assigned to the latter the Maxcy note and mortgage in exchange for notes and other securities of the face value of $104,000, but of a much less actual value, which the trust company assigned to the insurance company. At the same time, and as part of the same transaction, the two companies withdrew the Maxcy note and mortgage from the insurance commissioner, and

the insurance company substituted in place thereof a part of the securities which it had received from the trust company, and, in addition thereto, an amount of the capital stock of the latter company which it had issued to the former. These substituted securities were of the face value of about $104,000, but were in fact of a much less actual value. The remainder of the securities received by the insurance company in this exchange (of the face value of $18,000) were retained by it, and not deposited with the insurance commissioner. The state treasurer never countersigned or approved of the reassignment and surrender of the Maxcy note and mortgage, or the substitution of other securities in place of them, and never consented to, or had notice of, such attempted transfer, surrender, and substitution. Subsequently the trust company assigned and delivered the Maxcy note and mortgage to the state auditor, who still has possession of them. It is not alleged for what purpose this assignment was made, except that it was made "in part, at least, for the benefit of the trust company itself." All of this was done without the knowledge of the policy holders of the insurance company.

In September, 1895, the insurance company, being insolvent, made an assignment for the benefit of creditors. Its assets, exclusive of the securities on deposit with the insurance commissioner, are almost nominal, not exceeding $5,000. In an action subsequently commenced by the insurance commissioner and one of the policy holders on behalf of all the policy holders of the insurance company, the plaintiff was appointed receiver for the purpose of converting all securities deposited with the insurance commissioner in trust for the benefit of policy holders into money and distributing the proceeds. In order to carry this purpose into effect, he was given power to take possession of all such securities, and to bring such actions as might be necessary for that purpose. He demanded of both the trust company and the state auditor a delivery to him of the Maxcy note and mortgage, and at the same time tendered to the trust company all of the securities which it assigned to the insurance company, and which the latter had deposited with the insurance commissioner. This tender did not include the securities (of the face value of $18,000) which the insurance company itself retained, and never deposited with the insurance commissioner. Of course, neither these securities nor their proceeds have ever come into the hands of the

plaintiff. The demand being refused, the plaintiff brought this action, alleging in his complaint his continuing willingness to restore to the trust company all of the securities which have come into his possession.

We have eliminated from this statement all the allegations of the complaint of actual fraud and fraudulent representations on part of the two companies to induce the insurance commissioner to surrender the Maxcy securities, and accept other securities in place of them, for the reason that these allegations are not essential to the plaintiff's cause of action.

The policy holders of the insurance company were the beneficiaries of the trust, and, to the extent necessary to satisfy their policies, were the equitable owners of the Maxcy note and mortgage. They never consented to the exchange of securities. The insurance commissioner had no authority to consent to any exchange, or to surrender the trust property, except with the consent and approval of the state treasurer, expressed in the manner provided by statute. G. S. 1894, § 3155. He was merely the custodian of the property, vested with the bare legal title in trust for the policy holders. The trust company had or was chargeable with notice of these facts.

From a legal standpoint, the facts present a case where one person has unlawfully and knowingly taken the property of another, and deposited it with a third person. The law of the case would have been the same if the two companies had feloniously abstracted the securities from the office of the insurance commissioner, and one of them had subsequently deposited them with the state auditor.

And for the same reason this is not an action to rescind a voidable contract on the ground of fraud, as counsel for the defendants argue. The transfer and surrender by the insurance commissioner of the Maxcy securities were absolutely void. So far as the policy holders, or this plaintiff, who sues in their behalf, is concerned, there is nothing to rescind, and the law of rescission has nothing to do with the case. The policy holders were no parties to the arrangement by which the two companies exchanged securities and secured the surrender of their trust fund by the insurance commissioner, and the acceptance by him of something else in its place. They are merely seeking, through the plaintiff, as an officer of the court, to recover what is and has been all the time their property. On secur-

ing this, they are ready and willing to surrender to the trust company all of its securities which were deposited by the insurance company with the insurance commissioner. But on what principle of law or equity can they be required to make good or restore to the trust company those securities which have never come into their possession, and from which they have received no benefit. The trust company went into the transaction with its eyes open, and unlawfully dealt with property held in trust for the benefit of others. Under such circumstances it has no right to insist that it shall be made whole at the expense of the trust fund belonging to the policy holders. The plaintiff is required to do equity by returning such securities as have come into his hands, but that is upon a very different principle from the doctrine of rescission. The fact that the Maxcy note and mortgage exceeded the minimum amount of deposit required by statute (G. S. 1894, § 3332) is not material. The excess was as fully bound by the trust as the balance. Lancashire Ins. Co. v. Maxwell, 131 N. Y. 286, 30 N. E. 192.

It is contended, however, that the kind of business which the insurance company was doing was prohibited by G. S. 1894, § 3157, and therefore its deposit with the insurance commissioner was unauthorized, and could be withdrawn at pleasure. The section referred to in its original form was section 1, tit. 3, c. 1, Laws 1872, which was a codification and revision of the insurance laws of the state, the provisions of which related exclusively to fire, life, and marine insurance. Assuming, without deciding, that it prohibited other kinds of insurance, they were clearly authorized by Laws 1881, c. 123 (G. S. 1894, §§ 3331–3337, inclusive), entitled "An act to authorize and regulate within this state the business of insurance other than life, fire, and marine." We think this act is broad enough to authorize any kind of insurance that is not against good morals or public policy. Laws 1891, c. 94, § 1 (changing section 3157 to its present form), was an amendment of, and a restriction upon the operation of, the act of 1872, and was never intended to repeal the numerous acts on the subject of insurance which had been passed in the meantime since 1872. Section 3157, among others, was quoted in Seamans v. Christian B. M. Co., 66 Minn. 205, 68 N. W. 1065, cited by counsel, merely with reference to the authority of fire insurance companies.

What is said in the brief of counsel as to the standing and powers

of the receiver is predicated upon the erroneous assumption that this is an action for rescission, and is sufficiently answered by what has been already said on that subject. Aside from the possible power to receive payment at maturity, the insurance commissioner has no power except to hold the securities as custodian. He cannot administer the trust. That has to be done by the court. The court, through its receiver, is seeking to lay hold of the trust fund for the purpose of administering the trust according to law. The complaint states a cause of action.

2. The defendant Dunn, in support of his contention that the court has no jurisdiction over him, relies on a line of decisions of this court commencing with Rice v. Austin, 19 Minn. 74 (103), and ending with State v. Braden, 40 Minn. 174, 41 N. W. 817, to the effect that the courts cannot control or interfere with an executive officer of the state in his official acts. This court has undoubtedly gone further than any other in holding executive officers of the state exempt from the control of the courts in the performance of their official duties. This is especially true as to executive officers other than governor. It will be found, however, that in many of these cases what was said went further than what was decided. Whether our decisions on the subject ought to be modified, we have no occasion to consider now, for the reason that they are all clearly distinguishable from the present one. It will be found that in every one of these cases the state, as such, was interested. Some of them were suits to recover money or property from the state of which it was owner; others were brought to determine adverse claims to property claimed by the state, or to compel specific performance of the statutory contracts of the state; and still others to prevent a state officer from paying out the money of the state upon obligations of the state alleged to be void.

But this case involves only private rights in private property which is in the possession of a state officer, but in which the state, as such, never had, and never can have, any shadow of right of property. The court is not asked to compel the state auditor to perform any official act that can affect the interests of the state. All that is asked of him is that he turn over this trust fund to the court, so that it may be administered in accordance with the provisions of the trust to which it has been devoted. It cannot be that because this trust

fund, in which the state has not a dollar's interest, happens to be in the possession—and unlawfully at that—of an executive officer of the state, he can refuse to surrender the property, continue to hold it unlawfully, and thus deprive the policy holders of what belongs to them, and yet the courts can give them no relief, because an executive officer of the state is not subject to the control of the judicial department of the state government. We are confident that no case can be found in the books which goes to the extent of holding any such doctrine. Our conclusion is that, as respects the control and disposition of this trust fund for the benefit of policy holders, the state auditor is subject to the jurisdiction of the courts.

On the appeal of the trust company the order appealed from is affirmed, and on the appeal of the plaintiff the order appealed from is reversed.

CORNELIUS GAHAGAN v. AERMOTOR COMPANY.[1]

CONNOR GAHAGAN v. SAME.

January 19, 1897.

Nos. 10,256—(137).

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Negligence—Respondeat Superior.

In determining whether the doctrine of respondeat superior applies, the test is whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right, under the contract of employment, to control, in the given particular complained of, the action of the person doing the wrong. Rait v. New England F. & C. Co., 66 Minn. 76, followed.

Same—Question for the Jury.

Held that, in this case, this was, under the evidence, a question for the jury.

Same—Damages.

The injury to a boy aged between eight and nine years consisted of the mangling of the ends of the ring and middle fingers of the left hand, so as to require their amputation at or near the first joint. *Held* that, in the absence of any evidence of special or peculiar damages, a verdict in favor of the minor for $1,800 was excessive.

[1] Reported in 69 N. W. 914.

Appeal in each case by defendant from an order of the district court for Fillmore county, Whytock, J., denying a motion for a new trial. Affirmed in first action and modified in second action.

The first paragraph of the agency contract referred to in the opinion was as follows:

"And said sales agent agrees as follows: 1st. To do all the business pertaining to selling aermotors, towers, grinders, and repairs, to receive all goods shipped to him under this agreement, to pay freight and expressage on such goods from Chicago, and to keep them well housed and in good order until sold, free of taxes and all charges to said company, and to be governed by the printed instructions on the back of this contract, which are hereby referred to and made part of this contract, and the instructions of the Aermotor Company."

W. E. Todd, for appellant.

John Q. Farmer and *John A. Lovely*, for respondents.

MITCHELL, J. These actions were brought by the respective plaintiffs to recover damages caused by the negligence of the defendant,—the one by the infant for personal injuries to himself, and the other by his father for loss of his son's services resulting from the same injuries. Both actions were tried together and resulted in verdicts for the plaintiffs,—in favor of the infant for $1,800, and in favor of the father for $400.

The negligence charged was the erection and leaving unguarded, in a public street, a windmill, calculated to attract the attention and invite the interference of young children, ignorant of the dangers to which the cogwheels and gearing exposed them when the mill was set in motion by the wind. The evidence tended to show that the mill was set up by one Frankson, assisted by one Conklin, and no point is made but that the evidence justified the jury in finding that they were guilty of negligence.

The main question in the case was and is whether the relation between the defendant and Frankson was such that the doctrine of respondeat superior applies, so as to make the former liable for the negligence of the latter. This depends entirely upon the terms of the so-called "agency contract" (Exhibit E), in connection with those portions of Frankson's testimony bearing on the manner in which the business was actually carried on.

The defendant was a foreign corporation, whose principal place

of business was in the city of Chicago, where its mills were manufactured, and whence they were shipped to their agents in different parts of the country. By the contract referred to the defendant appointed Frankson its "sales agent," to canvass and sell its mills in certain territory in southern Minnesota, and northern Iowa. It is too long to be quoted in full, without which it is impossible to fully understand the exact relation which it created between the parties. It is unnecessarily prolix, somewhat involved and obscure in its provisions, abounds in repetitions, and contains some apparent contradictions. Many of its provisions tend to indicate that its object was to constitute Frankson a factor to sell on commission, upon the terms and subject to the conditions and limitations therein specified, but otherwise to leave him to carry on the business in his own way, free from any right of control or direction on the part of the defendant. But the last clause of the first paragraph will not reasonably admit of any other construction than that Frankson was to be governed by any instructions which the defendant might give as to the manner in which the business should be conducted,—in other words, that under this contract of employment the defendant had a right to direct the action of Frankson by any instructions it might give as to the manner in which he should conduct the business, not inconsistent, of course, with the express terms of the contract itself.

If this was so, then defendant had the right to control and direct his acts as to the manner in which the mills should be advertised, as, for example, setting up samples to attract public attention to them. His testimony tends to prove that he did receive some instructions from the defendant outside of the contract itself, and that he complied with these instructions, especially in the matter of advertising. It also appeared from his testimony, that setting up sample mills was a common way of advertising the business, and that this was at least known to the company. It also appears that this particular mill, having a stub tower, was especially adapted to such a purpose, and it is fairly inferable that, when Frankson ordered it, the defendant knew that he intended to set it up as a sample mill. But if the setting up of such a mill was within the scope of his agency, and if in that particular the defendant had the right to control his action, it is wholly immaterial whether it knew either of his setting it up or expressly directed him to do so.

In determining whether the doctrine of respondeat superior applies, the decisive test is the right to control the action of the person doing the alleged wrong in respect to the manner in which the work shall be done. In the recent case of Rait v. New England F. & C. Co., 66 Minn. 76, 68 N. W. 729, we stated the law thus:

"The word 'servant,' as used in this connection, is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong."

We think this is an accurate and complete statement of the general rule of law applicable to the subject.

If the defendant had, under its contract with Frankson, the right to control his action in the matter of setting up sample mills, then it is liable for his negligence. Under the evidence this was a question for the jury. It is true that its submission to them was not accompanied by such instructions as they ought to have received in order to decide it intelligently; but the defendant is not in position to complain of this, for it failed to ask for any more specific instructions on the subject.

2. The only remaining question is whether the damages awarded are excessive. The boy, one of eight children, was between eight and nine years of age. Aside from doing such chores about the house as he was bidden by his parents, the only work he had ever engaged in was selling newspapers on the village streets. His father was a butcher, whose occupation was to peddle through the country the flesh of animals which he bought and slaughtered. The injury to the boy consisted of the mangling of the ends of the ring and middle fingers of the left hand so as to require their amputation,—the one at the first joint, and the other just below the first joint. This was successfully done at one operation, and the fingers healed satisfactorily. Of course, this was necessarily accompanied by considerable pain; and there is some evidence to the effect that the ends of the fingers may always be somewhat more sensitive to heat and cold than if not amputated. There was, also, the opinion of a physician that the muscles supplying those fingers will not develop as fully as they would if the whole fingers were there. It is also true that

the amputation of the ends of these fingers constitutes something of a disfigurement of the person.

We have no desire to belittle the right which every one, even in the humblest walks of life, has to the possession of all his faculties, both mental and physical, unimpaired. But we are compelled to the conclusion that, in any view of the case, the damages awarded to the boy are excessive. There are certain professions, such as that of instrumental music, where the loss of the ends of two fingers, even on the left hand, would be quite serious; but it is self-evident, without the aid of evidence, that in all the ordinary occupations of life the injury to the boy will be almost inappreciable. We have often had occasion to say that the question is not for what sum of money would a person submit to such an injury, but what sum of money will compensate for it as far as money can compensate at all; and, where a person asks for pecuniary compensation, he cannot complain if the loss is estimated on a strictly pecuniary basis. If the boy is entitled, on this basis, to $1,800 for the loss of the ends of two fingers on the left hand, what would he have been entitled to, in the same ratio, for the loss of a leg or arm? It is evident that it would amount to a sum far beyond what any court would approve as within reason.

On the trial, near the close of the evidence, the plaintiff's counsel very adroitly dismissed the action as to Frankson and Conklin, the persons who, if any one, were actually guilty of negligence, giving as a reason (presumably in the presence of the jury) that they had established a cause of action against a Chicago corporation which was perfectly able to respond in damages. Reversible error can hardly be predicated on this, but the object is apparent; and it may, in part at least, account for the size of the verdict.

We are of opinion that the verdict in favor of the father is very liberal, but not so large that we would feel justified in holding it excessive, especially in view of the evidence as to the value of the surgeon's services for performing the amputation.

Ordered, therefore, that, in the action of Connor Gahagan, the order appealed from is affirmed, but that, in the action by Cornelius Gahagan, the order appealed from be reversed, unless the plaintiff, within 15 days after filing the remittitur in the district court, files his consent to a reduction of the verdict to $1,200, with interest from

the date of trial, in which case the order appealed from will be affirmed, and judgment for the plaintiff entered for the amount of the verdict as thus reduced.

FIRST NATIONAL BANK OF WAVERLY v. W. D. FORSYTH and Another.[1]

January 19, 1897.

Nos. 10,259—(228).

Negotiable Instrument—Overdue Interest.

An overdue and unpaid instalment of interest, known to the indorsee at the time of purchase, dishonors negotiable paper, and renders it subject, in the hands of the purchaser, to existing defenses between the original parties, the same as an overdue and unpaid instalment of principal. First Nat. Bank v. Scott Co., 14 Minn. 59 (77), followed.

Appeal by plaintiff from an order of the district court for Watonwan county, Cadwell, J., denying a motion for a new trial. Affirmed.

Ashley Coffman, for appellant.

J. W. Seager and *W. S. Hammond*, for respondents.

MITCHELL, J. The only question presented by this record is whether the promissory note in suit was dishonored paper at the time it was indorsed to the plaintiff, and therefore subject, in its hands, to defenses existing between the original parties. The note was executed April 4, 1891, and was payable July 1, 1894, with interest payable annually. The court finds that it was indorsed to the plaintiff on May 22, 1894; that on that day the plaintiff paid for it $243; that at that time there was interest overdue and unpaid on the note; and that that fact was known to the plaintiff at the time of the purchase. The evidence amply sustains these findings. No interest had ever been paid, and hence there were, at the time of the purchase, two yearly instalments of interest overdue and unpaid. The sum which was paid for the paper fully justified the court in finding that the plaintiff knew of this default. Therefore

[1] Reported in 69 N. W. 909.

the case is not distinguishable from First Nat. Bank v. Scott Co., 14 Minn. 59 (77). We are asked, however, to overrule that case, for the reason that it stands alone and is contrary to the uniform current of authorities in other jurisdictions. If this was true, it would probably be sufficient reason for overruling the case, because uniformity is eminently desirable in rules governing negotiable paper.

All the authorities agree that, when the principal of a note is payable by instalments, and one instalment is overdue and unpaid at the time the paper is indorsed and transferred, the whole paper is dishonored, and subject to all equities between the original parties. Whether or not the same rule applies when there is an instalment of interest overdue is a controverted question,—at least, the authorities are not all agreed on it.

The cases holding, either directly or impliedly, that the indorsee for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, are the following: Nat. Bank v. Kirby, 108 Mass. 497; Cromwell v. County of Sac, 96 U. S. 51; Kelley v. Whitney, 45 Wis. 110; State v. Cobb, 64 Ala. 127; Brooks v. Mitchell, 9 Mees. & W. 15. The first three are the only cases in which the question is discussed, and of these the last two adopt substantially the line of reasoning used in Nat. Bank v. Kirby. Among the text writers Daniel, Bigelow, and Tiedeman favor this rule. The supreme court of Wisconsin had held the same way in Boss v. Hewitt, 15 Wis. 260, but held differently, or at least expressed different views, in Hart v. Stickney, 41 Wis. 630, but finally overruled this dictum in Kelley v. Whitney, supra.

The authorities on the other side of the question are Newell v. Gregg, 51 Barb. 263; First Nat. Bank v. Scott Co., supra, and Chouteau v. Allen, 70 Mo. 290–339. While Newell v. Gregg is not the decision of a court of last resort, we do not find that it has ever been overruled in the state of New York, or that the court of appeals of that state has ever passed upon the question. These are all the cases we have been able to find on either side. The line of reasoning in Newell v. Gregg is that, as to notice of dishonor, there is no difference between an overdue and unpaid instalment of principal and an overdue and unpaid instalment of interest; that payment of one is as much a part of the agreement as payment of the other; and

that, in either case alike, the indorsee takes the note with warning that there has been a default, and that the maker may have a defense; and hence, if the one renders the paper dishonored, there is no reason for holding that the other does not. The reasoning in Nat. Bank v. Kirby is that, in their effect upon the credit of a note, there is a manifest difference between a failure to pay interest and a failure to pay principal; that interest is an incident of the debt, and differs from it in that it is not subject to protest and notice to indorsers or to days of grace; that the statute of limitations does not run against it until the principal is due, etc.

If the question were a new one in this state, we might, possibly, be inclined to adopt the Massachusetts doctrine, as founded on the better reasoning. But First Nat. Bank v. Scott Co. has stood unchallenged in this state for 27 years, and the decisions are not so numerous or so uniformly in favor of the opposite doctrine as to clearly prove that it is the established rule of the commercial world generally. If the rule ought to be changed, it is a very easy matter for the legislature to do it. The practical difference between the two doctrines is not as great as might at first seem, for, even under the Massachusetts rule, the nonpayment of interest is a fact proper to be considered, in connection with other circumstances, upon the question whether the holder is entitled to the position of one who has purchased the paper in good faith and without notice of existing defenses. And we do not think any court has ever gone so far as to hold that the defaults in payment of interest may not be so numerous and of such long standing as to be sufficient, of themselves, to justify a court or jury in finding that the holder was not a purchaser without notice. For these reasons we think that First Nat. Bank v. Scott Co. should be followed, upon the ground, if no other, of stare decisis.

Order affirmed.

SARAH S. JOHNSON v. ST. PAUL CITY RAILWAY COMPANY.[1]

January 19, 1897.

Nos. 10,268—(215).

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268 409
67 260
81 411
67 260
86 375

Street Railway—Negligence.

Held, that the evidence justified the jury in finding that plaintiff's injury was caused by the negligence of those in charge of defendant's car.

Same—Contributory Negligence.

Also, that there was no evidence to submit to the jury on the question of plaintiff's contributory negligence.

Same—Damages.

Also, that the damages awarded were excessive, and that a new trial should be granted unless plaintiff will consent to a reduction of the verdict.

Appeal by defendant from an order of the district court for Ramsey county, Otis, J., denying a motion for judgment notwithstanding the verdict or for a new trial. Modified.

Munn, Boyesen & Thygeson, for appellant.

Daniel W. Doty, for respondent.

MITCHELL, J. This was an action to recover damages for personal injuries. The plaintiff was riding in a funeral procession in a carriage driven by, and in the control of, her daughter-in-law. The funeral procession started on Eighth street, west of Broadway, in the city of St. Paul, and proceeded east on Eighth street to the intersection of that street with Broadway, where it crossed the railway tracks of the defendant, and then proceeded up the east side of Broadway. The carriage in which plaintiff was riding was near the rear of the procession, and while it was crossing the railway tracks it was struck by one of defendant's cars going south on Broadway, resulting in the injuries complained of. The allegations of the complaint are to the effect that the accident was caused by the negligence of defendant's servants who were in charge and operating the car. The answer denied any negligence on part of defendant's servants, and alleged that the plaintiff's injuries were caused solely by her own negligence. Such were the issues as made by the pleadings.

[1] Reported in 69 N. W. 900.

Upon the trial the main controversy was as to whether the collision was caused by the negligence of the person operating the car or by that of the person driving the carriage in which plaintiff was riding. The evidence on behalf of plaintiff tended to show that the driver of the carriage was, in the exercise of proper care, following the line of the funeral procession, and crossing the railway tracks at or near the center of the intersection of Eighth and Broadway streets, when the motorman, without giving any warning of the approach of his car, negligently ran into the carriage. On the other hand, the evidence on behalf of the defendant tended to prove that the driver of the carriage, instead of following in the funeral procession and crossing the tracks in the center of Eighth and Broadway, turned up the west side of the latter street as if going to drive up on that side of the tracks, but, after she had driven a short distance, she suddenly turned her horse across the railway tracks within 10 or 12 feet of the approaching car, when it was impossible for the motorman to stop it in time to prevent the collision; and that she did this notwithstanding the giving of constant signals of the approach of the car.

All that is necessary to be said as to the weight of the evidence is that, in our opinion, the preponderance was decidedly in favor of the contention of the plaintiff, especially as to where the driver attempted to cross the railroad tracks, and was ample to justify a verdict in favor of the plaintiff.

Aside from the amount of damages awarded, the only important question in the case is whether the court erred in refusing to give the jury defendant's second request to charge, which was as follows:

"That the plaintiff is bound to exercise such care as a reasonable person would exercise under similar circumstances; and, if she failed to exercise reasonable care and such failure contributed to her injury, she is guilty of contributory negligence, and cannot recover."

Of course this was made an issue by the pleadings, and the request, as far as it goes, is doubtless correct as a general abstract proposition of law. The question remains, however, whether, under the circumstances, the defendant was entitled to have it given to the jury.

The record presents a rather peculiar state of facts. The plaintiff was riding in a vehicle owned and driven by another. There

was no evidence that she had or exercised any control over the driver, or her management of the horse, or that there was any relation of master and servant or principal and agent between them, or that they were engaged in a joint enterprise in any such sense as to make the plaintiff responsible for the negligence of the driver within the doctrine of Howe v. Mplis., St. P. & S. S. M. R. Co., 62 Minn. 71, 64 N. W. 102. But, as was said in that case, the fact that plaintiff was not responsible for the driver's negligence will not relieve her from responsibility for her own negligence. She admitted on her cross-examination that she was familiar with the locality, and knew of the existence of the street-car tracks; that she did not look or listen for approaching cars, but sat in a deep study, with her eyes cast down, feeling entirely safe, as she was riding in a funeral procession. There is no evidence that her daughter-in-law was not a safe and competent driver, or that plaintiff knew, or had any reason to believe, that she was not performing her duty in exercising proper care in driving upon or across the street-railway tracks.

Assuming that plaintiff's version of the facts is correct that the carriage was following in the funeral procession, and crossing the tracks in the center of the crossing of Eighth and Broadway, where most of the carriages had just crossed, there was certainly nothing in the circumstances to suggest special or extraordinary vigilance, but, on the contrary, everything to make plaintiff feel, as she says, perfectly safe. It must also be kept in mind that crossing a street-railway track is ordinarily accompanied with very much less danger than crossing the tracks of a steam railway, and that the standard of reasonable care is very different, especially at a street crossing. The fact that one is driving in a funeral procession, which is readily seen, and not usually interrupted, by those in charge of street cars, is also calculated to inspire a feeling of safety, just as it did in the plaintiff. The age of the plaintiff is also to be kept in mind. All that the law requires of an infant is a degree of care commensurate with its age and discretion. We think the same rule should apply to old people, whose senses are blunted, and mental faculties impaired, by age. Like children, they are accustomed to intrust their safety to those who are younger and stronger mentally and physically than themselves; and within reasonable limits they may do so without being guilty of negligence.

Suppose, on the other hand, we accept as true the statements of defendant's witnesses that the driver of the carriage turned up Broadway as if intending to go up the west side of that street without crossing the car tracks, and then suddenly turned the horse on the tracks within a few feet of the approaching car. There is no evidence that plaintiff directed this, or knew in advance or in time to prevent it, that the driver intended to do this. On the contrary, defendant's evidence, if true, tends to show that it was done so suddenly that plaintiff could neither have anticipated nor prevented it. The same fact which would have justified the motorman in assuming that the driver was going to continue her course would certainly have justified the plaintiff in indulging in the same assumption.

Of course, no hard and fast rule can ordinarily be laid down, except in the most general terms, as to when the question of negligence is a question for the jury. Every case must depend on its own particular facts. But, whichever version of the facts is accepted as true, bearing in mind that the burden of proof on this issue was on the defendant, we are of opinion that under the peculiar combination of circumstances disclosed in this case there was no evidence to go to the jury on the question of plaintiff's contributory negligence, and for that reason, if no other, defendant's request to charge was properly refused.

This conclusion finds support in the manner in which the case was tried and submitted. While the issue of plaintiff's negligence was tendered by the answer, yet, as already stated, the contest on the trial was over the negligence of the driver of the carriage and the negligence of the motorman. Nothing occurred on the trial, as far as we can discover from the record, to suggest, directly at least, that the question of plaintiff's negligence was being made an issue, except the cross-examination of the plaintiff, which appears to have been directed to that question. When plaintiff's counsel was examining her as a witness in her own behalf, for the purpose of proving affirmatively that she was in the exercise of ordinary care, the court stopped him, saying, "There is no suggestion here yet that there was any contributory negligence on her part;" whereupon counsel dismissed the witness. Defendant's counsel was silent, and made no suggestion that he proposed to make an issue on that question.

After the evidence closed, the court opened his charge to the jury

by stating that the defense was that the accident did not occur through any fault or negligence of the person in charge of the car, but was the result solely of the negligence of the driver of the carriage in which plaintiff was riding. Thereupon plaintiff's counsel interrupted the court, stating that the answer alleged that it was solely through the negligence of the plaintiff. The court replied, in substance, that it made no difference what the pleadings alleged, that the question was what was claimed on the trial, and that he had stated the matter exactly as claimed by the parties upon the trial. Counsel was again silent, and interposed no objection to the view expressed by the court. The court then proceeded to instruct the jury, limiting the questions which they were to determine to the following: Did the accident occur through the negligence, or any negligence, on the part of the person in charge of the street car? Or was it through the negligence or sole negligence of the person driving the carriage? Or was it inevitable accident for which nobody was responsible? No exception was taken to these instructions. The court then charged the jury at considerable length.

Counsel for defendant had submitted to the court numerous requests to charge, among which was the one the refusal to give which is now assigned as error. Most of the others were given. This one contains a mere abstract proposition of law embodied in the most general terms, without any reference to any particular act of omission or commission which defendant claimed to constitute contributory negligence, containing no definitions of negligence or reasonable care, and not alluding to the question of the burden of proof. If given, it could have been of but little assistance to the jury. It was probably not obligatory on counsel for defendant to disabuse the minds of the court or of opposing counsel of an erroneous impression as to what were the issues under the evidence. It is also true, as counsel claims, that, if he saved the point by one exception, he was not bound to repeat it. We do not rest our decision on what thus occurred on the trial. We only refer to it because we think that it shows a state of circumstances that should incline a court towards an affirmance where the case is a border one, and it is a very close question whether the evidence made a case for the jury upon the issue to which the request was directed.

2. The only other question is whether the damages are excessive.

Plaintiff was between 75 and 76 years old, previously in somewhat feeble health, although able to take care of her room, and assist in the household work of her daughter-in-law, with whom she made her home. This injury consisted of a fracture of one of the bones on the outer side of the left ankle, and the tearing of the lateral ligaments of the ankle, and injury to the joint. The nature or extent of the injury to the joint does not appear. She suffered great pain, and was confined to her bed for three months, requiring constant care. She still suffers some pain, and according to the evidence of the physicians, which was not rebutted, she will never be free from pain, and will never be able to walk without a crutch, and hence will constantly require more or less care and attention. This will naturally, if not necessarily, affect her general health, and deprive her, during the remainder of her days, of much of the pleasure in life which only those can enjoy who are possessed of a sound body. The jury awarded her $4,000.

Of course, these injuries are very serious, and call for very substantial damages. But it must be remembered that the plaintiff is in the late autumn of life. According to the annuity tables, her expectation of life was only from six to seven years. Her natural infirmities would necessarily increase with her age, even although she had not received this injury; and for this the defendant, of course, is not liable. Old people naturally and properly command our sympathy. They have a right to pass the remainder of their days in as much comfort and happiness as the natural infirmities of age will permit. But still the fact remains that, estimated from a strictly pecuniary standard,—which is the correct one in these cases,—the damage to an old person, near the close of life, is much less than that which would result from a similar injury to one in youth, or the prime of life, whose days of pleasure and usefulness are still before them. Put at interest, at even 5 per cent., the amount awarded plaintiff would yield her an annual income of $200 for the remainder of her life, and still leave the principal unimpaired for her heirs or legatees. If used in purchasing an immediate life annuity, it would, even on a 4 per cent. basis, purchase an annuity of at least $628 for the remainder of her life.

There is another consideration which we think we may take into account, and that is that, however statesmen and financiers may dis-

agree as to the cause, a given sum of money has greater value—that is, greater purchasing power—than it had years ago. Decisions may be found, probably including some of our own, which would, by comparison, justify the size of this verdict. But our conclusion is that it is so clearly excessive that it ought not to stand.

Ordered, that a new trial be granted, unless within 15 days after a remittitur is filed in the district court the plaintiff files her consent that the verdict be reduced to $2,500, in which case the order appealed from is affirmed, and judgment may be entered on the verdict as thus reduced. Neither party to be allowed any statutory costs on this appeal.

CANTY, J. I cannot concur in the portion of the foregoing opinion which holds that there was no evidence to be submitted to the jury on the question of plaintiff's contributory negligence. I fully concur in the opinion in the Howe case, that the passenger is not responsible for the negligence of the driver, over whom he has no control, but that he is responsible for his own negligence in failing to observe whether or not the driver is doing his duty in looking out for the safety of such passenger, and in failing to take proper steps for his own safety if the driver is not doing so. I am also of the opinion that, whether the vehicle is crossing an ordinary commercial railway or a street railway, the question of the passenger's negligence is ordinarily a question for the jury, and that it was such a question in this case. I agree with the majority that the damages awarded by the jury are excessive.

HANS H. OLSON v. STATE BANK and Others.[1]

January 19, 1897.

Nos. 10,320—(99).

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Bank—Issue of Stock—Ultra Vires—Rescission by Stockholders.

Held, following Dunn v. State Bank, 59 Minn. 221: (1) That where the stockholders of a banking corporation voted to increase its stock, having authority to do so under the articles of association, and part of such stock was purchased by its president, who was also city treasurer, and paid for with city funds unlawfully used by him for that purpose, and the stock then sold by him to third parties, the stock was not ultra vires and void, but at most only voidable; (2) that, in view of the lapse of time after the stock was issued before the bank failed, the want of diligence on part of the holders in not sooner discovering the insolvency of the bank, and the large amount of corporate indebtedness still outstanding which has been incurred since the stock was issued, the holders of the stock have no right to rescind, as against creditors whose rights have become vested by the insolvency of the bank.

Appeal by defendants Manley and others from an order of the district court for Hennepin county, Belden, J., denying a motion for a new trial. Affirmed.

J. D. Emery, *J. O. Pierce*, *C. H. Slack*, and *C. E. Vanderburgh*, for appellants.

None of the appellants were in fact or law holders of stock in the bank, because the proposed increase of stock was never legally made. The statute provides that no increase of capital shall be valid until the whole amount of the increase is paid in cash. Such payment must be certified by the proper officer. G. S. 1894, § 2498. There is a similar provision in the national bank act. Rev. St. § 5142. The statutory requirement not having been complied with, the proposed increase in this case was invalid. There is no question here of waiver or of ratification. The sole question is the failure of the bank to observe a statutory requirement, a failure which rendered the increase of stock void. Scovill v. Thayer, 105 U. S. 143; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530; Page v. Austin, 10 Canada S. C. 132; Schierenberg v. Stephens, 32 Mo. App. 314; American T. Works v. Boston M.

[1] Reported in 69 N. W. 904.

Co., 139 Mass. 5, 29 N. E. 63; Winters v. Armstrong, 37 Fed. 508; Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39; Lincoln v. Express Co., 45 La. An. 729, 12 South. 937; Kampman v. Tarver, 87 Texas, 491, 29 S. W. 768; Bank v. Alison, L. R. 6 C. P. 54, 222; Stace and Worth's Case, L. R. 4 Ch. Ap. 682; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Charleston v. Bank, 5 Rich. (S. C.) 103; Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417; Clark v. Turner, 73 Ga. 1; Grangers' L. & H. Ins. Co. v. Kamper, 73 Ala. 325; Cartwright v. Dickinson, 88 Tenn. 477, 12 S. W. 1030; Steamboat Co. v. Sewall, 78 Me. 167, 3 Atl. 181; Brand v. Lawrenceville B. R. R. Co., 77 Ga. 506, 1 S. E. 255.

The bank received only $3,000 for this issue of 250 new shares. Kortgaard's fraudulent use of city funds did not constitute a valid payment, but was a sham payment. Crawford v. Rohrer, 59 Md. 604. See Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496; Eaton v. Bank, 144 Mass. 260, 10 N. E. 844; American T. Works v. Boston M. Co., supra. The bank had express notice that the funds were trust funds, checks being signed by Kortgaard as city treasurer. Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648; Shaw v. Spencer, 100 Mass. 382. The bank therefore became a trustee for and liable to the city. There was no increase of stock, because the essential condition of payment was lacking.

There can be no estoppel in a case like this. It is public policy that statutory requirements of the bank law be complied with literally. If these requirements are disregarded, they cannot be made valid upon the principle of estoppel. 1 Lindley, Partn. 134; Veeder v. Mudgett, 95 N. Y. 295; Banigan v. Bard, 134 U. S. 291, 10 Sup. Ct. 565.

The bank could not hold these appellants as holders of the new stock. The acts of Kortgaard were the acts of the bank. The bank, having left the sole management to him, is bound by his acts. The bank is liable for any wrong done by its issue of stock certificates. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 49, 50, 64; Bruff v. Mali, 36 N. Y. 200; Titus v. Turnpike Road, 61 N. Y. 237; Fishkill Savings Inst. v. National Bank of Fishkill, 80 N. Y. 162; Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917.

John B. Arctander, for respondent.

Scovill v. Thayer, 105 U. S. 143, 149, clearly distinguishes the case where a bank has no right to increase its capital, and one where it has

the power, though not in the manner which was followed. Under the Minnesota statute, the proviso of G. S. 1894, § 2498, is in the nature of a condition subsequent. The increase is first to be voted and then the stock is to be paid for as issued. The language is that "No such increase shall be valid unless paid in full." These words may mean "absolutely void," but they may mean "voidable." A voidable contract is not valid, as well as one which is absolutely void.

On the facts this case is stronger against the stockholders than that of Dunn v. State Bank, 59 Minn. 221, 61 N. W. 27.

After bankruptcy a stockholder cannot bring an action to rescind. The American doctrine that the capital stock of the corporation is a trust fund for creditors would prevent any diminution of such fund after the act of insolvency. Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349; Sanger v. Upton, 91 U. S. 56; Sawyer v. Hoag, 17 Wall. 610; Clapp v. Peterson, 104 Ill. 26; Crandall v. Lincoln, 52 Conn. 73; Adler v. Milwaukee P. B. Mfg. Co., 13 Wis. 57; Vick v. La Rochelle, 57 Miss. 602; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Gill v. Balis, 72 Mo. 424; Upton v. Tribilcock, 91 U. S. 45; Brant v. Ehlen, 59 Md. 1; Beach, Priv. Corp. 213, 223; Scovill v. Thayer, supra; Kehlor v. Lademann, 11 Mo. App. 550; Hatch v. Dana, 101 U. S. 205; Pullman v. Upton, 96 U. S. 328; Hawley v. Upton, 102 U. S. 314; Flinn v. Bagley, 7 Fed. 785; Sturges v. Stetson, 1 Biss. 246, Fed. Cas. No. 13,568; Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Crawford v. Rohrer, 59 Md. 599; Pittsburg & C. Ry. Co. v. Stewart, 41 Pa. St. 54; Peoria & S. Ry. Co. v. Thompson, 103 Ill. 187; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; New Castle H. Ry. Co. v. Simpson, 21 Fed. 533; Spurlock v. Missouri P. Ry. Co., 90 Mo. 199, 2 S. W. 219; Harrison v. Arkansas V. Ry. Co., 4 McCrary, 264, 13 Fed. 522; Fosdick v. Sturges, 1 Biss. 255, Fed. Cas. No. 4,956; Fisk v. Chicago, R. I. & P. Ry. Co., 53 Barb. 513; O'Brien v. Chicago, R. I. & P. Ry. Co., 53 Barb. 568; Mann v. Cooke, 20 Conn. 178; Neuse River Nav. Co. v. Commrs. of Newbern, 7 Jones L. 275; Osgood v. King, 42 Iowa, 478; Beach, Priv. Corp. 232; Bissell v. Heath, 98 Mich. 472, 57 N. W. 585.

The English rule denies a shareholder, after the company has become insolvent, the right to repudiate his liability on the ground of fraud. Henderson v. Royal B. Bank, 7 El. & Bl. 356; Dossett v. Harding, 1 C. B. (N. S.) 524; Powis v. Harding, 1 C. B. (N. S.) 533; Daniell v. Royal Brit. Bank, 1 H. & N. 681; Oakes v. Turquand, L. R. 2 Eng. & Ir.

Ap. 325; Stone v. City Bank, 3 C. P. Div. 282; Kingsford v. Merry, 11 Exch. 577; Wright's Case, L. R. 7 Ch. App. 55, 60; Pugh & Sharman's Case, L. R. 13 Eq. 566. These English decisions have been generally followed in this country. Ogilvie v. Knox Ins. Co., 22 How. 380; Upton v. Tribilcock, supra; Chubb v. Upton, 95 U. S. 667; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864.

MITCHELL, J. This action was brought by the plaintiff, in behalf of himself and all other creditors of the defendant bank, to enforce the liability of stockholders for corporate debts. The defenses interposed by the appellant defendants were, substantially, that (1) they were induced to purchase the stock by false and fraudulent representations which entitled them to rescind; (2) the stock, being illegally issued, was absolutely void and never had any legal existence as stock. The court held defendants liable as stockholders, and ordered judgment accordingly; and the only question presented by this appeal is whether the findings of fact justified this conclusion of law.

So far as here material, the findings are substantially as follows: The defendant bank was organized as a banking corporation under chapter 33 of the General Statutes,[2] with a paid-up capital of $75,000, but with authority under its articles of association to increase it, by a majority vote of its shareholders, to $500,000. In July, 1892, the stockholders duly voted to increase the capital stock to $100,000 by the issue of 250 additional shares of $100 each. Ten shares of this increased stock were subscribed for by defendant Nelson Williams, 5 shares by defendant Mrs. Williams, 15 shares by other persons not parties to this appeal, and the remaining 220 shares by Kristian Kortgaard. On August 10, 1892, the cashier of the bank certified under oath to the public examiner of banks to the payment in cash of the $25,000 increase, and on August 12 the public examiner issued his certificate certifying that the bank had complied with all the provisions of law in regard to such increase of stock, and that the $25,000 had been paid in as part of the capital of the bank, and approving of such increase.

Certificates for this increased stock were issued to the persons assumed to be entitled to the same. Neither the bank nor the sub-

[2] G. S. 1894, §§ 2490–2532.

scribers seem to have awaited the official action of the bank examiner, for the stock certificates were issued to Mr. Williams August 3, to Mrs. Williams August 6, and to Kortgaard August 10. Of this increased stock issued to Kortgaard, he sold and transferred certain shares, August 15, to defendant Woodward; August 19, to defendant Brown; December 5, to one Snyder, who on December 8 assigned to defendants C. H. Chadbourn & Sons; December 8, to defendant Nowell; December 15, to defendant Sanborn; December 15, to defendant Manley; January 6, 1893, to defendant Jenks; February 4, to defendant Mrs. Williams. All of these transfers were made on the books of the bank, and new certificates issued to the transferees in place of those issued to Kortgaard.

During all this time Kortgaard was the president of the bank, and its virtual manager, without any direct or active supervision of its affairs on part of the board of directors, who left everything solely to him. He was also treasurer of the city of Minneapolis, and had deposited to his credit as such treasurer in other banks large sums of city funds. He represented to the Williamses, when they subscribed and paid for their stock, that the bank was sound and prosperous, and that its stock was a good and desirable investment, and then worth more than par. He made the same representations to the other defendants, to whom he sold portions of his own stock, and each and all of the defendants purchased the stock in reliance on these representations.

The court finds that it does not appear, from the evidence, that such representations were made with the consent, knowledge, or connivance of either the stockholders or directors, or that they ever authorized him to make them, or that they ratified them, except as such authority may be inferred from the fact that the stockholders passed a resolution authorizing the president and cashier of the bank to offer the increased stock for sale, and to issue certificates therefor. It does not appear that the bank ever received any of the money paid to Kortgaard for the stock sold by him.

The representations made by Kortgaard as to the condition of the bank and the value of its stock were wholly false. As a matter of fact, at the time the increased stock was voted and ever afterwards, the bank was, on account of the embezzlement and fraudulent misappropriations of its funds by Kortgaard, utterly and hopelessly in-

solvent; over $375,000 of its nominal assets consisting of worthless notes of corporations which Kortgaard had organized for the express purpose of enabling him to borrow large amounts of money from the bank. These facts, however, were unknown to the other stockholders and directors, who voted for the increase of stock in good faith, on Kortgaard's representations that the bank was prosperous, and that the increase was required to meet the increase of its business. None of the defendant stockholders had notice or knowledge of any fact tending to excite suspicion as to the true condition of the bank, until its failure in June, 1893. But neither at the time they purchased their stock, nor at any time before the failure of the bank, did they make any examination or inspection of its books or records in order to ascertain its condition, or ever request the privilege of doing so. Had they made such investigation and examination, they would have discovered facts reasonably tending to show the true condition of the bank, and that it was utterly insolvent.

All of the defendants, except Jenks and Mrs. Williams (as to the five shares purchased from Kortgaard), received dividends on their stock. No question is made but that Mr. and Mrs. Williams paid in full with their own money for the stock, which they purchased directly from the bank. Kortgaard, in payment of the 220 shares increased stock issued to him, drew checks, signed by him as city treasurer, payable to the defendant bank, on the banks in which the city funds were deposited, for the aggregate amount of $22,000. These checks were presented through the clearing house to the banks on which they were drawn and by them paid, and the money represented by them received by the defendant bank, and converted to its own use. For the remaining $440 (the stock having been subscribed for at 2 per cent. premium) Kortgaard gave his own personal check on the defendant bank, where his account was already overdrawn.

None of the officers or stockholders of the bank, other than Kortgaard himself, knew that he had paid for his stock with city funds. Neither was it known to any of the defendants until it was discovered by an expert after the bank failed, nor could the fact have been discovered, except with the aid of an expert, by a careful scrutiny of the books, and by tracing the checks through the clearing house. There is no evidence that this money has ever been paid back to the

city, or that the city has ever made any demand for it, or ever had any notice of the transaction before the bank failed.

The court finds that Haugen, the successor of Kortgaard as city treasurer, "has proved its claim against said bank in this action for a sum exceeding $106,000, which sum was due from said bank to said city at the time of the failure of said bank." But it clearly appears, from the thirtieth finding, in connection with the schedule of claims attached to the findings, that this claim is for money deposited on open account by Haugen himself as city treasurer subsequent to February 15, 1893. Hence, upon the findings, it must be assumed that the city has never made any claim against the defendant bank for the money which Kortgaard misappropriated, but that the bank still retains the benefit of it as part of its assets.

On June 22, 1893, the bank closed its doors, and suspended business, and on the 27th of the same month made an assignment of all its property for the benefit of its creditors. There have been filed and allowed against the bank claims for over $500,000, including a preferred claim in favor of the state for $75,000. The assets in the hands of the assignee, after paying the claim of the state, will not pay over 10 per cent. of the other claims. Eighty-four persons, with claims aggregating over $40,000, became creditors subsequent to September 1, 1892, and prior to February 15, 1893. One hundred and fifty-two others, with claims aggregating nearly $270,000, became creditors subsequent to February 15, 1893. But the court finds that it does not expressly appear whether any of these creditors became such or contracted with the bank upon the faith or credit of the apparent ownership of this stock by the defendants.

About a year after the bank failed each of the defendants brought an action to have the stock issued to him canceled and declared null and void, offering to return the dividends which they had received. These actions are still pending. So far as appears, this was the first movement looking to a rescission or a repudiation of the relation of stockholders.

It must be apparent, from this statement of facts, that this case, in all its legal aspects, is fully covered by the decision in Dunn v. State Bank, 59 Minn. 221, 61 N. W. 27, which was an action brought by a holder of some of this increased stock to have it canceled, and adjudged null and void, on the same grounds which are here urged

by way of defense. Indeed, the facts found make a weaker case for the defendants than did the facts alleged in the Dunn case, except, possibly, in the single particular that the court here finds, in substance, that the defendants could not, by the exercise of reasonable diligence, have discovered the fact that Kortgaard had paid for his stock with city funds. But the very eminent counsel for the defendants have earnestly contended that this case is distinguishable from the Dunn case, and, even if it is not, that that case was wrongly decided, and should not be followed. For this reason, accentuated by the fact that the learned trial judge intimates his doubts as to the correctness of the decision in that case, and the further fact that the questions involved are very important, we have carefully re-examined the whole ground with a determination not to be deterred by any false pride of opinion from overruling the Dunn case if we should become satisfied that it was erroneously decided.

Treating this increased stock, not as absolutely void, but only voidable, on the ground of fraud, it must be clear that, under any rule, either English or American, the defendants have no defense, now that the bank has become insolvent and the rights of creditors have become vested. In view of the length of time which elapsed after the stock was issued before the bank failed, the want of diligence on part of the defendants in not sooner discovering at least the utter and hopeless insolvency of the bank, and the large amount of corporate indebtedness created since the stock was issued, and which is still outstanding, the right to rescind should be denied, according to the overwhelming weight of authority in this country, even from those courts which have not adopted the English rule. As is said by a learned judge in one of the very cases cited by defendants: [8]

"When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion."

A person is not an outlaw because he has taken stock in a corporation, but when he does so knowing, as he must, that credit will be given to the corporation upon the faith of that stock, as the law presumes, and the corporation subsequently becomes insolvent, the

[8] Thayer, J., in Newton Nat. Bank v. Newbegin, 74 Fed. 135, 140.

equities of the creditors are, at least under all ordinary circumstances, superior to his. This is one of the risks which he necessarily takes in assuming the relation of stockholder.

Counsel for the defendants do not seem to combat this very earnestly, but their main contention is that this increased stock, never having been fully paid for,—the payment by Kortgaard with city funds being, as they claim, no payment at all,—was not merely voidable, but absolutely void, never had any legal existence at all as stock, and therefore never conferred upon the holders any of the rights, or imposed upon them any of the duties or obligations, of stockholders. In support of this position they invoke G. S. 1894, § 2498, which reads as follows:

"Any association organized under the provisions of this chapter [33] may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this chapter. But no increase of capital shall be valid until the whole amount of the increase proposed is paid [in] in cash, and such payment certified under oath by the president or cashier of such association to the state auditor, who shall give his certificate that the provisions of this section have been complied with, and specifying therein the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as a part of the capital of such association. * * *"

Reference is also made to section 466 of the Penal Code,[4] which makes it a crime, punishable by imprisonment in state's prison, for any officer of a bank, knowingly, willfully, and with intent to defraud, to sell or issue any certificate of shares, contrary to the charter or laws under which the corporation exists, or in excess of the power of the corporation, or the limit imposed by law or otherwise upon its power to create or issue stock.

It seems to us that counsel are in error in assuming that payment for the stock by Kortgaard with city funds amounted to no payment at all. Conceding, without deciding, that the bank was chargeable with notice that the money with which the stock was paid for was city funds, wrongfully converted by Kortgaard, and that the city might have recovered it back from the bank, still, according to the findings, it has never asserted any such claim, and, for anything that appears, may never do so, but leave the bank to enjoy

[4] G. S. 1894, § 6762.

the benefit of the payment the same as if made with Kortgaard's own funds.

But we are not disposed to rest the decision of the case on this ground. It seems to us that the fundamental error of counsel is in claiming too much for the statute when they contend that, if this stock was not in fact all fully paid in, it is ultra vires, and absolutely void for all purposes and as to all persons. Their chief reliance in support of this position is the expression "no increase of capital shall be valid until," etc. This provision was substantially copied from the national banking act. It was intended to secure the actual payment of stock, so as to prevent what is called "watering stock." Aspinwall v. Butler, 133 U. S. 595–608, 10 Sup. Ct. 417. According to the views expressed in that case, this provision would have been violated by the issue of more stock than had been paid for, but not by an issue of the exact amount that was paid for. If this is so, it would seem to settle the question of the validity of at least the 15 shares issued to the Williamses which they paid for in full with their own money. But, if the whole of this increased stock is absolutely void, because not all fully paid in, we do not see why the same argument would not apply, and the same result follow, as to original stock issued in violation of some express provision of statute.

For example, a bank is forbidden to commence business before the minimum amount of capital, $25,000, has been paid in cash, and such payment certified to the state auditor under oath by the president or cashier. But it would never do to hold that, after a bank had gone into business, and dealt with the public, in violation of this provision of the statute, its stock was void, and that the stockholders were not liable as such creditors. Again, we have a statute [5] which provides that corporations having capital stock divided into shares shall not issue any shares for a less amount to be actually paid in on each share than the par value of the shares first issued. If stock was issued in violation of this express provision of statute, we apprehend no court would hold, as against creditors, that the stock was absolutely void, so as to exempt the holders from liability. It is true that neither of the provisions referred to use the term "invalid," or "not valid," but the acts suggested are none the less illegal, being positively prohibited by statute.

[5] G. S. 1894, § 3415.

The authorities upon the question when stock is ultra vires, in the sense of being absolutely void, and having no legal existence as stock for any purpose, are not altogether clear or satisfactory. We have examined almost every case cited by appellants, and, while some of them contain dicta which seem to support their position, we have found no well-considered case which is not, in our judgment, clearly distinguishable from the present one, both in its facts and in what was actually decided. Some of them are cases where the relation of stockholder had never been consummated, but the defendant was sued on his subscription for stock, and the defense was that the stock of the corporation had never been all subscribed for, and the court simply held, in accordance with a very elementary doctrine, that a subscription for stock is made on the implied condition that all of the stock will be taken, and that, where the condition has not been fulfilled, or waived, the subscriber is not liable on his contract, whether the action be brought by the corporation or by a receiver.

There are other cases where the holder of stock, not guilty of any laches, seasonably brought an action to rescind while the corporation was a going concern, but its insolvency ensued while the action was still pending, and it was held that the subsequent insolvency did not affect or abate the plaintiff's right to prosecute his action. None of these cases are in point, or furnish any aid in the determination of the present one.

The most numerous class of cases cited by counsel, and those mainly relied on, are those where the issue of stock was beyond the limit fixed by the statute or the articles of association—with notice of both of which all the world is chargeable—which the corporation could issue under any circumstances, and hence ultra vires and void. Nearly allied in principle to these are cases where the charter or articles of association fix the capital at a certain amount, with authority to increase it to a larger amount by a vote of the stockholders, but the increased stock was issued without any such vote.

Some cases hold that, in such case, the stock is wholly ultra vires and void. This seems to proceed upon the theory that the vote of the stockholders is analogous to, or the equivalent of, an amendment of the articles of association, and that therefore the case supposed is the same in principle as where stock is issued beyond the

limit fixed by the statute or articles of association. In that class of cases the corporation had no power to issue the stock at all, and the whole world was chargeable with notice of the fact. But in the present case the statute and articles of association gave the stockholders the power to make the increase, and they voted to do so. Therefore the power to issue the stock existed, and creditors could, without fault, assume that all the subsequent requirements of the statute had been fully performed. The defect, if any, was that all these requirements had not in fact been fully complied with, although certified to under oath by the cashier and by the bank examiner. This distinction is clearly pointed out in Veeder v. Mudgett, 95 N. Y. 295, and Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, which last case the court distinguishes, on that very ground, from Scovill v. Thayer, 105 U. S. 143.

It seems to us that this suggests the correct line of cleavage between void and voidable stock, at least where the corporation has become insolvent and the vested rights of creditors have intervened. To hold that increased stock is ultra vires, and absolutely void, because not all fully paid for, would convert into a shield for fraudulent or negligent stockholders a provision of statute which was designed for the protection of the public, and especially of creditors, who might trust the corporation. The effect of such a holding would not be merely to relieve the holders of this stock from all liability to creditors, for the inevitable logic of such a decision would be to permit them to convert themselves into creditors of the corporation for the amount which they had paid in for the stock.

If this stock is ultra vires, so that it never had any legal existence as stock for any purpose, we fail to see any principle on which even Kortgaard himself might not assert the fact, had he continued to hold it. To permit him to do so would, we apprehend, shock the conscience of any court. But how can it be stock in Kortgaard's hands, and not stock in the hands of his transferees? Again, suppose this bank was still a going and prosperous concern, and the Williamses were asserting against it the rights of stockholders on the shares which they purchased and paid for in full; would it be held that the bank could successfully resist their claim on the ground that Kortgaard had not paid for his stock, or had paid for it with stolen money? We think not. But how could it be stock

when they are asserting rights under it, and not stock when creditors are seeking to hold them liable on it?

We therefore adhere to all that was decided in the Dunn case, and our conclusion is that this stock was at most only voidable while the bank was still a going concern, but that, under the facts, the right, as against creditors, to avoid or rescind, no longer exists.

Order affirmed.

OLUF STENDAL v. ALLEN P. BOYD.[1]

January 19, 1897.

Nos. 10,356—(230).

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Negligence—Pleading.

In action for damages resulting from acts of another, alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegations of the pleading. Rolseth v. Smith, 38 Minn. 14, followed.

Appeal by defendant from an order of the district court for Ramsey county, Kelly, J., overruling a demurrer to the complaint. Affirmed.

Walter L. Chapin, for appellant.

John L. Townley, for respondent.

MITCHELL, J. This was an action to recover damages for the death of plaintiff's intestate, a child of tender years, caused by the negligence of the defendant. Briefly stated, the allegations of the complaint are that the defendant, being the owner of a lot adjacent to a public street in a densely populated part of the city of St. Paul, made a deep excavation upon it, by quarrying stone, which filled with standing water which was luring and enticing to young children, who were, to the knowledge of defendant, accustomed to go

[1] Reported in 69 N. W. 899.

there to play; that he left it unguarded, and in such condition as to be a menace to their lives. The complaint alleges that these acts of omission and commission were negligently done. It also alleges certain facts for the purpose of showing that they were negligent, under the special circumstances of the case. The purpose of the pleader was to bring his complaint within the principle of the "turntable cases" (Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207, and Railroad Co. v. Stout, 17 Wall. 657). The defendant demurred, on the ground that the complaint did not state a cause of action. This appeal is from an order overruling the demurrer.

It seems to us that defendant has attempted to raise by demurrer a question that can only be properly raised after the evidence is introduced at the trial. Negligence is a mixed question of law and fact; and hence an allegation of negligence, as applied to the conduct of a party, is not a mere conclusion of law, but, rather, a statement of an ultimate fact. Under such an allegation, a party may prove any facts or circumstances, not inconsistent with the particular facts alleged, which would tend to prove that the acts alleged were negligent. Hence we held in Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565, that, in an action for damages resulting from certain acts of another alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegations of the complaint.

In Twist v. Winona & St. P. R. Co., 39 Minn. 164, 39 N. W. 402, we intimated quite clearly our views that the doctrine of the "turntable cases" ought not to be extended. We did not mean by this that we would not apply the doctrine to any but "turntable cases," but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool or pond of water to stand on a vacant lot. To bring a case of such a pond within the principle of these cases, it would have to be exceptional and peculiar in its circumstances. The allegations of the complaint may be suggestive that it will be difficult for the plaintiff to bring himself, by his proof, within that principle; but we cannot hold, as a matter of law, that the complaint does not state a cause of action. The question of de-

fendant's negligence may become a question of law, after plaintiff has introduced all his evidence, but not before.

Order affirmed.

A. W. BRADLEY and Another v. GILBERT G. THORNE.[1]

January 19, 1897.

Nos. 10,390—(240).

Disclosure of Garnishee—Conclusiveness.

The "disclosure" of the garnishee is competent evidence in favor of a "claimant," and against the plaintiff, for the purpose of showing what property had been impounded by the garnishee proceedings, and thus identifying it as the same property to which the claimant is asserting a right.

Action in the district court for St. Louis county by A. W. Bradley and another against M. C. Burke and another, as defendants, and Eastern Railway Company of Minnesota, as garnishee. Gilbert G. Thorne as receiver of the Keystone National Bank of West Superior intervened as claimant of the property alleged to be in the hands of the garnishee, and the issues between plaintiffs and the intervenor were tried before Moer, J., who found and ordered judgment in favor of the intervenor. From a judgment in favor of the intervenor plaintiffs appealed. Affirmed.

N. A. & H. G. Gearhart, for appellants.

Schmidt, Reynolds & Mitchell and *Hughes & Whitford*, for respondent.

MITCHELL, J.[2] The garnishee made its disclosure, by which it admitted its indebtedness to the defendant Burke for railroad ties purchased from him, but stating that it had been notified by Thorne, as receiver, that he claimed a part of the proceeds. Thereupon Thorne appeared, and asserted his right to the money in the hands of the garnishee, by virtue of an alleged assignment executed by Burke, prior to the service of the summons on the garnishee, as col-

[1] Reported in 69 N. W. 909.

[2] Buck, J., absent.

lateral security for a pre-existing debt. On the trial of the issues between the plaintiffs and the claimant, the latter, against the objection and exception of the former, introduced in evidence the disclosure of the garnishee, for the purpose of showing what had been impounded by the garnishee proceedings.

Assuming, without deciding, that the disclosure of a garnishee is no part of the record, and also that it was necessary for the claimant to identify the debt assigned to him as being the same that was impounded by the garnishee proceedings, there can be no doubt that the disclosure was competent evidence for that purpose. The disclosure of a garnishee is the sole basis of any judgment against him, except where the plaintiff files a supplemental complaint in the manner provided by statute.[3] His disclosure in response to the garnishee summons shows what property has been attached, and in that respect is analogous to the return of the sheriff to an ordinary writ of attachment. If any statements of the garnishee in his disclosure had been offered as evidence against the plaintiff for any other purpose,—as, for example, to show that the assignment to the claimant was prior to the service of the garnishee summons,—it would have been clearly inadmissible. That is all that is decided in any of the cases cited by counsel. See Easley v. Gibbs, 29 Iowa, 129; Scott v. Stallsworth, 12 Ala. 25.

There is nothing in the point that the pre-existing indebtedness, without more, was not a sufficient consideration for the assignment by Burke to the bank as collateral security. No case ever so held. Counsel misapprehend the point decided in the cases which they cite. The courts were not considering the question whether a past-due indebtedness was a sufficient consideration to sustain an assignment as collateral security for the debt, but whether, without more, it would, under the law merchant or otherwise, give the assignee greater rights against third parties than his assignor had.

Judgment affirmed.

[3] G. S. 1894, § 5319.

EDWARD C. BAUMANN v. CITY OF DULUTH and Others.[1]

January 19, 1897.

Nos. 10,460—(302).

City of Duluth—Water and Light Bonds—Ballot.

Held that, under the form of ballot submitted to the electors of the city of Duluth upon the subject of issuing water and light bonds, and expending the proceeds, propositions 2 and 3 were competing propositions, and that an elector could vote against both, but not in favor of both.

Appeal by the City of Duluth, Henry Truelsen, Mayor, Cyrus T. Crandall, a member of the Common Council, and the Common Council, from a judgment of the district court for St. Louis county, entered in pursuance of the findings and order of Moer, J. Affirmed.

Ellsworth Benham, City Attorney, *Draper, Davis & Hollister*, and *Washburn, Lewis & Bailey*, for appellants.

Henry F. Greene, for respondent.

MITCHELL, J. Assuming to act under the provisions of the city charter (Sp. Laws 1891, c. 55, § 35) the common council of the city of Duluth submitted to the electors the following ballot, to be voted on at the general election held November 3, 1896, pursuant to G. S. 1894, § 6:

1. Upon the proposition of issuing additional water and light bonds of the city of Duluth to the extent of one million six hundred and ninety-five thousand dollars ($1,695,000) for the purpose of erecting or purchasing a water and light plant.	Yes	
	No	
2. Upon the proposition of expending the moneys derived from the sale of said bonds in purchasing a water and light plant already in existence in the city of Duluth, said bonds to be issued and sold by the common council as the same may be needed to pay for said plant, or to discharge or take up the bonded indebtedness of said plant.	Yes	
	No	
3. Upon the proposition of expending the moneys derived from the sale of said bonds in erecting a water and light plant in said city, said bonds to be issued and sold by the common council as the same may be needed for that purpose.	Yes	
	No	

This ballot was headed by an instruction to the voters to put a cross mark opposite the word "Yes" standing opposite each proposition which they wished to vote for, and a like cross mark opposite

[1] Reported in 69 N. W. 919.

the word "No" standing opposite each proposition which they wished to vote against. The provisions of the statute under which this election was ordered seem to be the source of never-ending trouble, and have already been several times before this court. Truelsen v. City of Duluth, 60 Minn. 132, 61 N. W. 911; Id., 61 Minn. 48, 63 N. W. 714; Janeway v. City of Duluth, 65 Minn. 292, 68 N. W. 24. This form of ballot was held sufficient under the statute in Janeway v. City of Duluth, supra. We did not hold, as the trial court seems to think, that it was not confusing and misleading, but merely that it was not more so than the form which the statute authorized.

At the election in question there were cast, on the first proposition, 6,076 votes in the affirmative, and 4,483 in the negative; on the second proposition, 5,150 votes in the affirmative, and 4,953 in the negative; on the third proposition, 4,404 votes in the affirmative, and 5,350 in the negative. Of the votes thus cast 2,193 voted in the affirmative and 2,247 in the negative on both the second and third propositions. In canvassing the vote the common council counted all these ballots, and declared as the result that propositions 1 and 2 were carried, and proposition 3 defeated. Thereupon Baumann instituted a contest on three grounds, to wit: (1) That the common council had previously exhausted its power under the statute, by submitting to the voters of the city certain propositions on the same subject at the election referred to in Janeway v. City of Duluth, supra; (2) that they had no authority to submit these propositions to a vote of the people at the general election in November, 1896, the same not being "a general city election," within the meaning of the statute; (3) that they did not correctly canvass the vote on the second and third propositions, in that the ballots of those who voted in favor of both of these propositions should have been rejected. The court decided against the contestant on the first and second grounds, for the reason that they involved questions which could not be raised in an election contest, but decided in his favor on the third ground. The city appealed, but the contestant did not.

It must be apparent, from this, that the only questions before us are those involved in the third ground of contest. However desirable it might be to have the questions involved in the first and second grounds settled, any deliverance we might make on them would be purely obiter.

The contention of the contestant is that propositions 2 and 3 were competing and inconsistent propositions, that a voter had a right to vote in favor of only one of them, and, consequently, when he voted in favor of both, he failed to indicate which one he was in favor of, and therefore his ballot should be rejected. On the other hand, the contention of the city and common council is that, although these propositions may be competing, they are independent in form, and, being thus presented on the ballot, each voter is entitled to vote "Yes," or "No," upon each; that although in one sense competing, yet the two propositions are not inconsistent; that it is entirely consistent with the purpose of the statute that an elector who is in favor of proposition 1 may vote in favor of both propositions 2 and 3, and thus favor leaving to the common council the discretion to use the bonds for either purchasing or erecting a water and light plant as they may deem most expedient. They further contend that, if the ballots in favor of both propositions 2 and 3 should be rejected, then, for the same reasons, those against both propositions should also be rejected.

It will be discovered, by computation, that whether these double affirmative and double negative votes are both counted, or both rejected, the result will be the same; that is, proposition 2 was carried and proposition 3 was defeated. It is only by rejecting the former and counting the latter that both propositions will be defeated. The question presented is a perplexing one, and any solution of it will be subject to objections. But the vice is inherent in the plan of voting authorized by the statute, and all that we can do is to apply legal principles to the facts as they exist. The cardinal principle governing all election cases is that the intention of the voter shall prevail, when the ballot itself, upon examination, clearly discloses what his intention was; but, where it is impossible to determine what his intention was, his ballot must be rejected.

We are satisfied that propositions 2 and 3 are competing propositions, in the fullest sense of the term. The scheme of the ballot evidently contemplates that, if a voter is in favor of either, he shall indicate on his ballot which one he is in favor of. If he votes in favor of both, he fails to express his choice as completely as does a voter who votes for two rival candidates for the same office. It is not permissible to give effect to a ballot in favor of both proposi-

tions as meaning that the voter did not care in which of the two ways the money should be expended, but was willing to leave that matter to the discretion of the common council. The scheme of the ballot does not contemplate anything of the kind. It means that, if a voter is in favor of one of the propositions, he shall say which one. If any such discretion is to be reposed in the common council, that must be done, if at all, through the votes on proposition 1, in case it prevails and propositions 2 and 3 are defeated. This could only be upon the theory that proposition 1 is independent and operative, although propositions 2 and 3 are defeated. This is a question to which we shall refer hereafter. Neither will it do to hold that, when an elector voted for both propositions 2 and 3, he was in favor of expending the money for both purposes; for the ballot contemplates that it shall be expended for only one or the other.

But there is no analogy in this respect between the ballots of those who vote in favor of, and those who vote against, both propositions 2 and 3. The votes of the latter are not only responsive to the ballot, but they clearly express the intention and wish of the voter. He is opposed to expending the money for either purpose, and, that intention being clearly shown by his ballot, we see no legal reason why his vote should not be counted. It can be urged with considerable force that the theory upon which the form of ballot was framed was that those who were opposed to issuing bonds at all should expend and exhaust their negative votes on the first proposition, and that the other two were only submitted for the purpose of ascertaining in which one of the two ways the voters wished the money to be expended in case proposition 1 carried. It may be that this was in the mind of those who prepared the ballot; but, if so, they did not adopt a form in accordance with any such theory. It seems to us that the logical consequence of any such argument would necessarily be that no one could vote "No" on either of propositions 2 or 3.

It is further urged that, if it is held that electors might vote against both propositions, but not in favor of both, then a minority voting against proposition 1 might defeat the will of a majority voting in favor of it, by casting a solid vote against both the other two propositions, provided the majority divided their affirmative votes between the two. It must be conceded that this is so, assuming that proposition 1 is not independent, but only operative in case one

of the others prevail. But this cannot be helped. The difficulty lies in the form of ballot which renders such a result possible. Our conclusion is that the court below was right, and the result is that both propositions 2 and 3 were defeated.

Counsel have discussed somewhat the question whether or not proposition 1 is independent, and operative to authorize the issue of bonds for the purpose of either purchasing or erecting a water and light plant, as the common council may elect, although both of the other propositions are defeated. This question is not involved in this appeal, and we express no opinion upon it.

Judgment affirmed.

T. J. SHAY v. SECURITY BANK OF DULUTH.[1]

January 22, 1897.

Nos. 10,218—(236).

67 287
68 230
69 72
69 127
67 287
80 228

Chattel Mortgage—Insolvency of Mortgagor.

Held, a chattel mortgage executed before, but not filed of record until after, the mortgagor makes an assignment under the insolvency law for the benefit of his creditors, is void as to such creditors.

Same—Who may Attack.

Held, the purchaser of the mortgaged property from the assignee has the same right as the assignee himself to avoid the chattel mortgage on the ground that it is fraudulent as to such creditors.

Same—Burden of Proof.

Held, such an assignee is presumed to represent creditors of the assignor, and the burden is on the party asserting the contrary to prove it.

Same.

Held, the burden is also on the party asserting it to prove that the creditors of the assignor had such notice of such unrecorded mortgage that they are not in position to take advantage of the failure to file it of record.

Appeal by plaintiff from a judgment of the district court for St. Louis county, in favor of defendant, entered in pursuance of the findings and order of Moer, J. Reversed.

[1] Reported in 69 N. W. 920.

McGindley & Whitely, for appellant.
McCordic & Crosby, for respondent.

CANTY, J. We shall state the facts in chronological order. On January 6, 1896, Nellie Slater was the owner and in possession of a stock of goods, and on that day executed and delivered to defendant a chattel mortgage on the same to secure her note to defendant for $600. On February 6, 1896, she made an assignment for the benefit of her creditors, under the insolvency law of this state, to one Warfield, who qualified, and entered upon the discharge of his trust. On February 18, defendant filed of record the chattel mortgage in the city clerk's office. On February 20, Warfield, as assignee, sold and delivered said stock of goods to plaintiff. On February 23, "defendant, without the permission and consent of plaintiff, took possession of said goods under and by virtue of its said chattel mortgage." Plaintiff brought replevin. On the trial before the court without a jury, the court found for defendant, and from the judgment entered in his favor plaintiff appeals. It will be observed that the assignment was made a month after the chattel mortgage was executed, and 12 days before it was filed of record.

1. It has frequently been held by this court that a chattel mortgage which has not been filed in the proper office until after an assignment for the benefit of creditors, under the insolvency law, is void as to the creditors of the assignor. Farmers' L. & T. Co. v. Minneapolis E. & M. W., 35 Minn. 543, 29 N. W. 349; Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117; Thomas Mnfg. Co. v. Foote, 46 Minn. 240, 48 N. W. 1019.

2. Respondent's contention that, while the assignee can avoid such a mortgage, the purchaser from him cannot do so, is not well founded. The purchaser at an execution sale of land conveyed away by the judgment debtor in fraud of his creditors may set aside the conveyance (Campbell v. Jones, 25 Minn. 155); and, in our opinion, a purchaser of personal property from such an assignee has the same right as the assignee himself to avoid such a chattel mortgage as fraudulent as to the creditors of the assignor.

3. It does not affirmatively appear that the assignor represents any creditors, and respondent contends that it must affirmatively appear that he did, before plaintiff can recover. We cannot agree with respondent. G. S. 1894, § 4233, provides:

"That in all cases of general assignments for the benefit of creditors, the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors; and shall have all the rights which such creditors would have to avoid such fraudulent conveyances and transfers."

The legislature has declared that the assignee "shall be considered as representing" such creditors, which is equivalent to saying that he shall be presumed to represent such creditors. The above section of the old assignment law is made applicable to the insolvency law of 1881 by section 1 of the latter (G. S. 1894, § 4240). The practice under the insolvency law has always proceeded on the theory that the assignor is presumed to have had creditors and to have been insolvent when he made the assignment. Any other theory would require the assignee, almost every time he went into court, to take all the creditors along with him as witnesses. The administration of insolvent estates is expensive enough without inaugurating any such unreasonable practice. Of course, no such inconvenience in practice would arise under an assignment law under which the assignee does not represent creditors, because he would not be involved in litigation in which he could and should invoke the rights of creditors. But, under our insolvency law, assignees are almost continually invoking these rights. If, every time he attempts to repudiate a transaction of the assignor as an unlawful preference or as a fraud on creditors, he must show that there are creditors whom he represents, his authority is, indeed, very frail, and his duties very embarrassing. It is contended that he must show that he represents at least one creditor. Suppose he does this, and when he rests the opposite party shows that this particular creditor is not in position to assert that the transaction is fraudulent as to him,—as, for instance, in this case, that such creditor had notice of the unrecorded chattel mortgage from the time it was executed. What can the assignee do then? He will find himself defeated, although there were in fact many other creditors whom he represented, but as to whom he introduced no evidence. No, the assignee could not safely rest until he had proved every creditor's claim in every such case. The legislature never intended any such unreasonable practice. It must, under the statute, be presumed that the assignee represents

creditors, and the burden is on the opposite party to show that he does not.

The case of Baker v. Pottle, 48 Minn. 479, 51 N. W. 383, is not, as respondent contends, opposed to this view. In that case, although the mortgage was not filed for two months after it was executed, it was filed ten days before the receiver in insolvency was appointed. The mortgage, having been filed of record before the mortgaged property was levied on by creditors, or sequestered for their benefit, was not void in law, under G. S. 1894, § 4129, as to all the creditors of the assignor, generally; and it does not appear from a reading of the whole opinion that the court intended to hold that it was. Under the circumstances, the agreement to withhold the mortgage from record and the withholding it from record were, as to creditors generally, merely badges of fraud which warranted the court in finding that the mortgage was fraudulent in fact. But there was one creditor whose rights were greater than those of the creditors generally. His debt was incurred during the time the mortgage was being withheld from record, and at a time when he had no notice of the existence of the mortgage. As against him, the mortgagee was estopped from asserting any rights under the mortgage, and the court held that the assignee represented this creditor so as to be able to invoke the aid of this additional ground for attacking the mortgage. To require an assignee to plead and prove an exceptional and peculiar right, such as this, is very different from requiring him to plead or prove that he represents creditors of the ordinary and usual character.

4. The burden was also on defendant to show that the creditors of the insolvent, Nellie Slater, had such notice of the existence of the chattel mortgage that they are not entitled to take advantage of the failure to file it of record. Thomas Mnfg. Co. v. Foote, supra. This disposes of the case.

The judgment is reversed, and, on the findings of fact, judgment is ordered for plaintiff.

START, C. J. (dissenting). I dissent from so much of the decision of the court as, in effect, holds that in an action by an assignee in a voluntary assignment for the benefit of creditors under the insolvency laws of the state, to set aside a transfer of property, valid

as between the parties but voidable as to creditors without notice, it will be presumed without proof that there are such creditors. Also to the conclusion that in this particular case the facts found by the trial court entitle the plaintiff to judgment. The trial court found that the defendant's mortgage was given in the ordinary course of business to secure a present loan of money, without any intention of defrauding the creditors of the mortgagor. The mortgage was not filed until after the mortgagor had made a voluntary assignment in insolvency for the benefit of her creditors, but it was duly filed before the plaintiff purchased the chattels covered by the mortgage from the assignee. The purchaser brought this action against the defendant, who was in possession of the chattels as such mortgagee, to recover possession of them. Conceding that the plaintiff has the same right to avoid the mortgage as the assignee, it seems to me that the findings fall short of showing that the plaintiff is entitled to judgment, for there is no finding that there were at the time of the sale to the plaintiff any existing creditors who could avoid the mortgage, or any creditors who had or were entitled to prove their debts against the estate of the mortgagor. The only finding referring directly or indirectly to the existence of such creditors is No. 5, which is in these words:

"That upon the 6th day of February, 1896, the said Nellie Slater [the mortgagor] made an assignment for the benefit of her creditors to one Andrew A. Warfield under the provisions of the insolvency laws of the state of Minnesota."

In the absence of any statute changing the rule, an assignee in a voluntary assignment for the benefit of creditors stands in the shoes of his assignor; his rights and powers are not the same as those of a receiver in equity. It is only by virtue of G. S. 1894, § 4233, that such an assignee can avoid transfers of property by his assignor which are fraudulent as to creditors. Flower v. Cornish, 25 Minn. 473; Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117. But the statute, which is quoted in full in the majority opinion, gives to such assignees the same right, but no greater, to avoid fraudulent transfers, as the creditors whom he is considered as representing would have had to avoid such transfers if no assignment had been made. That is to say, if there are creditors who are entitled to avoid a transfer in a given case, the assignee is considered or presumed to represent

them; but the statute as it reads does not provide that, when the assignee brings an action to avoid a transfer alleged to be fraudulent as to creditors, it shall be presumed that there are creditors who are entitled to avoid the conveyances, from the simple allegation or finding that he is an assignee in insolvency for the benefit of creditors.

If the statute is to be amended by judicial construction so as to provide that, when the assignee brings such an action, it shall be presumed from the simple fact that he is such assignee that there are existing creditors who have proven their debts and are entitled to have the conveyance set aside, why not go further, and amend the statute so as to provide that it shall be also presumed prima facie that he is entitled to recover? If the creditors themselves brought such an action, they would be required to prove that they were creditors, and in a position to avoid the transfer. Why, then, should not their representative make like proof? It is suggested that it would be inconvenient for him to do so. This, if correct, would not justify an arbitrary construction of the statute so as to confer upon the assignee rights and advantages superior to those possessed by his principals, the creditors. But it would seem to be an easy matter for the assignee in any action brought by him to make proof of the existence of creditors, as proof of all claims must be filed. An examination of the paper books in previous cases brought to this court wherein assignees or receivers in insolvency have sought to set aside transfers fraudulent as to creditors or to recover the possession or value of property so transferred, shows that they have invariably proved the existence of creditors, where the fact was not admitted. Thus in Merrill v. Ressler, supra, the assignee expressly alleged in his answer the existence of creditors, some of whom had proved their debts. In Thomas Mnfg. Co. v. Foote, supra, proof was made by the assignee of the existence of creditors. In Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447, which was an action by a receiver in insolvency to set aside a fraudulent conveyance, the complaint directly alleged the existence of creditors. The allegation of the complaint in the case of Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696, alleged that the insolvent was at the commencement of the action indebted to persons other than the mortgagor. In Baker v. Pottle, 48 Minn. 479, 51 N. W. 383, the receiver made proof

of the existence of at least one creditor whose debt was contracted without notice of the alleged fraudulent mortgage. So, also, in Smith v. Pearson, 44 Minn. 397, 46 N. W. 849, the receiver made proof of the existence of creditors, some of whom had proved their debts. This practical construction of the statute by the bar of the state seems to me to be the correct one, and that in an action by an assignee in insolvency or his vendee to set aside a fraudulent transfer of property, or to recover the possession of it or its value, it cannot be presumed from the mere fact that he is such assignee that there are creditors who are entitled to have the transfer set aside. If this be so, then finding No. 5 in this case is not sufficient to justify the conclusion of law that the plaintiff is entitled to judgment, and the judgment appealed from should be affirmed.

BUCK, J. I also dissent upon the grounds stated by the CHIEF JUSTICE.

FRANCES S. WHEELER v. JOHN D. BENTON.[1]

67 293
71 456

January 22, 1897.

Nos. 10,257—(245).

Principal and Agent—Presumption.

A long course of dealing by an agent for his principal, during which his acts had never in any manner been repudiated by the latter, *held* to raise a presumption that the agent had actual authority to do what was done by him in line with such course of dealing.

Same.

The principal is dead. The agent is the husband of plaintiff, and, under the statute, cannot, without her consent, be called by defendant to testify, but can be called by her. There was no direct testimony in the case that the agent had authority to bind his principal by the acts in question. Plaintiff failed to call said agent, and failed to offer any evidence to show want of authority in the agent. *Held*, under all the circumstances, it must be presumed that the agent had authority, or that the principal subsequently ratified his acts, and the court below erred in finding against this presumption.

[1] Reported in 69 N. W. 927.

Appeal by defendant from an order of the district court for Hennepin county, Belden, J., denying a motion for a new trial, after trial by the court and order for judgment in favor of plaintiff for $6,130.14. Reversed.

Wilson & Van Derlip, for appellant.

As respects third persons an agency may be created or its character determined in three ways: (1) By express authority; (2) by authority implied from the relations of the parties; and (3) by the apparent authority which one person permits another to possess. The distinction between implied authority and apparent authority exists, though the two are often confused. Johnson v. Milwaukee & W. L. Co., 46 Neb. 480, 64 N. W. 1100; Winchell v. Nat. E. Co., 64 Vt. 15, 23 Atl. 728; Mechem, Ag. § 4; 18 Cent. L. J. 165, 166; Bronson's Execr. v. Chappell, 12 Wall. 681; Columbia Mill Co. v. Nat. Bank, 52 Minn. 224, 53 N. W. 1061. The sole question here is, then, did Wheeler possess such apparent authority as to justify Darling and King in supposing he could contract concerning this note. See finding of court No. 15, quoted in opinion. Knowles is estopped by his acts. If he did not actually know of Wheeler's assumed authority, he was put upon his inquiry. Such inquiry would have compelled either ratification of Wheeler's action or the repudiation of any unauthorized act. 2 Pomeroy, Eq. Jur. §§ 607, 608; Stein v. Swensen, 46 Minn. 360, 49 N. W. 55; Fowlds v. Evans, 52 Minn. 551, 563, 54 N. W. 743. The fact that Wheeler, who was the only living person having cognizance of Knowles' knowledge or ignorance, was not called as a witness, although he sat through the trial beside his wife's counsel, is not consistent with strict integrity of purpose. Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296; Germania S. V. & T. Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797.

M. P. Brewer, for respondent.

CANTY, J. Defendant is the maker of the promissory note in suit, which is dated April 22, 1887, due three years from date, for the sum of $4,200, and payable to the order of one Betts, who in January, 1888, indorsed and delivered it to one Henry L. Knowles, a resident of the state of New York. Knowles died in 1892, and the note was acquired by plaintiff, his daughter, as a part of her share

of his estate. On the trial before the court without a jury, the court found for plaintiff, and from an order denying a new trial defendant appeals.

The court finds that coupons were attached to the note for each semiannual instalment of interest during the three years; that, as these coupon notes fell due from time to time, they were presented for payment by one Wheeler, who resided at Minneapolis, and was the husband of plaintiff, and son-in-law of Knowles; that he received payment of each coupon as it fell due, and surrendered it; that the principal note and coupons were secured by a mortgage on certain real estate owned by defendant; that in November, 1888, he conveyed the real estate to one King, who, in consideration thereof, "and with the knowledge and consent of Wheeler," assumed and agreed to pay the mortgage indebtedness, and thereafter Wheeler presented the coupons to King, and received payment of the same from him. The court further finds that, at the maturity of the principal note, in April, 1890, Wheeler and King agreed that the time of payment should be extended for six months, and in consideration thereof King agreed to pay interest on the indebtedness during that time at the rate of 8 per cent. per annum, which he paid to Wheeler at the end of that time; that Wheeler and King then agreed that the payment of the note should be again extended for another period of six months, and, in consideration thereof, King agreed to pay interest on said indebtedness at the same rate during that time; and that defendant never knew of or consented to either of these extensions. It is further found that King never paid the interest at the end of said second extension, and that no interest has ever been paid on the note since. The court further finds:

"(15) Neither said Henry L. Knowles nor the plaintiff in said action at any time took any action with reference to said note to the knowledge of defendant or of said King; or communicated to defendant or said King, or the agent or the representative of either of them, the fact of their respective interests in said note; or in anywise communicated to or notified the defendant or said King of their ownership of said note or mortgage, or of either; but said Charles H. Wheeler was the only person who, to the knowledge of defendant or said King, ever exercised or assumed to have any authority or control of said note and mortgage after the 22d day of April, 1888, until the commencement of this action; and no objection was ever made to the defendant or said King, by said Knowles or any other person, respecting the

extension of time for the payment of said note, or to either of said extensions, nor did said Knowles repudiate or disaffirm either of said agreements for the extension of the time of payment of said note."

There is no evidence of authority from Knowles to Wheeler authorizing the latter to agree to either of said extensions, except such as appears from Wheeler's own acts as aforesaid, and from the further fact that no attempt was made by either Knowles or plaintiff to collect the indebtedness or demand payment of it during the time of such extensions, or to assert any claim against defendant until August, 1894, when Wheeler demanded payment of defendant; but no other demand was made on him until this action was commenced, in March, 1895. The uncontradicted evidence shows that Wheeler demanded from King payment of the principal note at its maturity, before the agreement for the first extension of the time of payment; and at the end of the time of the second extension he again demanded payment from King of the principal and interest, and frequently afterwards importuned King to pay the note, but, as before stated, never made any demand on defendant for payment until a short time before the commencement of this action. At the time of these extensions King was solvent, and amply able to pay the indebtedness, but has since become insolvent; and the mortgage security was then amply sufficient, but now it is not. As a part of the sixteenth finding of fact the court found:

"There is an entire absence of evidence in the case that Charles H. Wheeler was at any time the agent of Henry L. Knowles for any purpose whatever, except as may be inferred from the fact of his possession and collection of said several coupons collected by him at the times when they were thus collected."

The court subsequently amended this finding of fact so as to read as follows:

"(16) Upon the evidence in this case I am unable to find that the said Knowles ever authorized the said Wheeler to extend the time for payment of the said note, or that he ever ratified any agreement made by the said Wheeler to that effect, and I am unable to find that the said Knowles ever had any notice or knowledge that the said King had assumed the payment of the said note."

On the trial plaintiff offered no evidence except the note in suit. While the assignments of error are not sufficient to raise directly the question that the findings of fact are not supported by the evi-

dence, still the defendant asked for additional findings covering the evidence above referred to, which additional findings should, under the circumstances, have been allowed, and the refusal to allow the same is assigned as error. The evidence warranted and required all the findings above quoted except the sixteenth, which, in our opinion, is, both in its original form and as amended, contrary to the evidence.

When King for a valuable consideration assumed the payment of this indebtedness, he became the principal debtor, and defendant a mere surety. If Knowles authorized or ratified either of the extensions of the time of payment given to King, defendant was released from liability. True, there is no direct evidence that Knowles ever had any knowledge of the conveyance to King, or of the assumption of the indebtedness by him, or of the extensions given by Wheeler to King. But a long course of dealing by an agent for his principal, during which his acts have never been questioned or in any manner repudiated by the latter, will, as a general rule, raise a presumption that the agent had actual authority to do what is done by him in line with such course of dealing. See Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

Wheeler had knowledge of the assumption of the mortgage indebtedness by King ever since 1888, and for a year and a half thereafter collected regularly the semiannual interest from him. When the principal and last instalment of interest fell due, Knowles received only the interest. Six months later he again received, as the complaint admits, the interest for that six months, but he did not receive the principal. During all of this time, and for four or five years afterwards, no demand was made on defendant by either Knowles or plaintiff for either principal or interest. It cannot be presumed that, for four or five years, Knowles and plaintiff forgot the existence of this indebtedness, or neglected to inquire concerning it, or that, if they had inquired, they would not have discovered what Wheeler knew as to the assumption of the mortgage by King, and what Wheeler had done as to extending the time of payment. If Knowles discovered these things, it was his duty promptly to disaffirm Wheeler's acts in extending the time of payment, or his failure to do so would amount to a ratification of those acts.

On the facts in this case, the presumption is that Wheeler had au-

thority to grant the extension, or that Knowles subsequently ratified his acts in doing so, and the court below erred in finding against this presumption.

If Wheeler and Knowles were both dead, or incompetent to testify for plaintiff, the case would be different, and a finding for either party might, perhaps, be sustained. But Wheeler is a competent witness for plaintiff, but, being her husband, is not, without her consent, a competent witness for defendant. G. S. 1894, § 5662. It being in plaintiff's power to rebut the presumption arising from the long silence and apparent acquiescence of Knowles and herself in the acts of Wheeler, her failure to do so, under the circumstances, increases and strengthens such presumption, so that the finding of the court against this presumption cannot be sustained.

The order appealed from is reversed and a new trial granted.

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67 298
79 230
67 298
86 28

GEORGIETTA BECKETT v. NORTHWESTERN MASONIC AID ASSOCIATION.[1]

January 22, 1897.

Nos. 10,285—(235).

New Trial.

Held, the district court has power to set aside an order granting a new trial on the ground that such order was erroneously granted, at least, if set aside before the time to appeal from it expires.

Action by Guardian—Amendment.

The complaint duly alleged that the probate court appointed G. B. guardian of the infant plaintiff, A. B. The plaintiffs were named in the title of the complaint as "G. B., in Her Own Behalf, and as Guardian of A. B." *Held*, the court might, after verdict, grant leave to amend such title, so as to read "G. B., in Her Own Behalf, and A. B., by G. B., His Guardian."

Witness—Cross-Examination.

Held, the widow and beneficiary of the insured could not, on cross-examination, in an action brought by her on the life insurance policy, be questioned as to statements made to her by her deceased husband in his lifetime.

[1] Reported in 69 N. W. 923.

Suicide—Experiments.

The insured was found dead, with a bullet hole in the back of his head, and a revolver in his hand. The defense to the action was that he committed suicide. There was evidence tending to prove that there were no powder marks around the wound. *Held*, for the purpose of rebutting the theory of suicide, it was competent to prove experiments made in discharging the same revolver loaded with similar cartridges, and noting at what distances from the muzzle of the revolver the object fired at was found to be singed or powder-burned.

Expert.

Held, whether a witness is sufficiently qualified as an expert is a question of fact for the trial court, and an appellate court will not hold the ruling thereon erroneous unless it is clearly so.

Proof of Death—Contradiction.

The policy required proofs of death to be furnished to the insurer, but did not state what such proofs should contain. *Held*, plaintiff could, on the trial, explain and contradict statements made in such proofs as to the manner of death.

Verdict Sustained.

Held, the verdict is sustained by the evidence.

Appeal by defendant from two orders of the district court for Hennepin county, Pond, J., the one granting plaintiffs a rehearing and setting aside a previous order which granted defendant a new trial, and the other denying defendant's motion for a new trial, after a verdict in favor of plaintiffs for $1,033.65. Affirmed.

J. H. Randall and *F. A. Gilman*, for appellant.

Child & Fryberger, for respondents.

The appeal from the trial court's order granting a rehearing of the motion for a new trial should be dismissed. If the trial court had no jurisdiction to make the order it is not reviewable by appeal therefrom. An order granting a rehearing is an interlocutory order. It is not an order involving the merits or affecting a substantial right. Flischmann v. Stern, 90 N. Y. 110; Jones' Appeal, 99 Pa. St. 132; 2 Enc. Pl. & Pr. 93; Little v. Leighton, 46 Minn. 201, 48 N. W. 778; Dodge v. Bell, 37 Minn. 382, 34 N. W. 739; St. Cloud v. Karels, 55 Minn. 155, 56 N. W. 592; Chouteau v. Parker, 2 Minn. (95) 118; McMahon v. Davidson, 12 Minn. (243) 366. There is no merit in the appeal from the order. The district courts of this state have ample

power to set aside their own orders or judgments. G. S. 1894, § 5267; First Nat. Bank v. Briggs, 34 Minn. 266, 26 N. W. 6; Meister v. Russell, 53 Minn. 54, 54 N. W. 935; Coburn v. Life I. & I. Co., 52 Minn. 424, 54 N. W. 373.

The trial court's order amending the title of the action was an intermediate order, and not having been made on the trial and not appearing in the settled case and being unappealed from, is not properly reviewable now in this court.

Where suicide or any other defense is to be proved entirely by circumstantial evidence, such defense is not established, so as to take the case from the jury, so long as reasonable men might reasonably draw different conclusions from the evidence. Washburn v. Nat. Accident Soc., 10 N. Y. Supp. 366; Home Benefit Assn. v. Sargent, 142 U. S. 697, 12 Sup. Ct. 332; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Leman v. Manhattan L. I. Co., 46 La. Ann. 1188, 15 So. 388; Phillips v. Louisiana E. L. I. Co., 26 La. Ann. 404; Germain v. Brooklyn L. I. Co., 26 Hun, 604; Continental Ins. Co. v. Delpeuch, 82 Pa. St. 225; Keels v. Mutual R. F. L. Assn., 29 Fed. 198; Ingersoll v. Knights, 47 Fed. 272; Hale v. Life I. & I. Co., 61 Minn. 516, 63 N. W. 1108; Bennett v. Syndicate Ins. Co., 39 Minn. 256, 39 N. W. 488.

CANTY, J. This is an action on a life insurance policy which provides that, "if the insured shall die by his own hand or act, whether sane or insane, within three years from the date of this policy," the policy shall be void. He died within the three years after the date of the policy, and the defense is that he died by his own hand. On April 13, 1895, he was found dead, lying on some dry leaves, among some scattering trees on the outskirts of a farm. The body was lying on the face, leaning a little towards the left side, with a bullet hole about an inch and a quarter back of the right ear, just at the edge of the hair above the back of the neck. A revolver was held loosely in the right hand. On the trial plaintiff had a verdict. The court, on defendant's motion, granted a new trial, then ordered a rehearing of the motion, then set aside the order granting a new trial, and then heard again the motion for a new trial on its merits, and denied it. Defendant appeals from the order setting aside the order granting a new trial, and also from the last order made, denying a new trial.

1. On the authority of Grant v. Schmidt, 22 Minn. 1, Semrow v. Semrow, 23 Minn. 214, and Weld v. Weld, 28 Minn. 33, 8 N. W. 900, appellant contends that the court below exhausted its jurisdiction when it granted the motion for a new trial, and had no power subsequently to set the order aside. In answer we will say that in 1876, after the first two of those cases arose, the statute [2] was amended so as to add the following provision to the section:

"* * * And the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered or proceedings had, in or out of term, upon good cause shown, set aside or modify its judgments, orders or proceedings, although the same were made or entered by the court or under or by virtue of its authority, order or direction. * * *"

This was clearly intended to do away with the rule of law laid down in the Grant case. The case of Weld v. Weld arose after this amendment, but the court in a dictum approved the Grant case, evidently without having its attention called to the amendment. In the case at bar, the order granting a new trial was set aside before the time to appeal from it expired, and we are clearly of the opinion that said amendment gave the court below authority to set it aside, if deemed erroneous. State S. & D. M. Co. v. Adams, 47 Minn. 399, 401, 50 N. W. 360.

2. The policy was made payable to the surviving widow of the insured "and his surviving children equally." He left but one child, Arthur Beckett, a minor. The title of the complaint named the plaintiffs as "Georgietta Beckett, in Her Own Behalf, and as Guardian of Arthur Beckett, an Infant." The court, after granting the motion for a new trial, allowed plaintiffs to amend the title of the action, so as to state the plaintiffs as "Georgietta Beckett, in Her Own Behalf, and Arthur Beckett, by Georgietta Beckett, His Guardian." This is assigned as error. We are of the opinion that the amendment was properly allowed. The complaint duly alleged that Georgietta was by the probate court appointed guardian of Arthur, and the defect in the title was a mere matter of form, which did not go to the merits. Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Bliss, Code Pl. § 145.

3. The court did not err in refusing to permit defendant to cross-

[2] G. S. 1866, c. 66, § 105. See G. S. 1894, § 5267.

examine the widow as to statements made to her by the insured in his lifetime. G. S. 1894, §§ 5660, 5662, subd. 1.

4. Plaintiffs, for the purpose of proving that the deceased had not committed suicide, introduced evidence tending to prove that there were no powder marks around the wound in the back of his head, and then introduced evidence of experiments made after his death, with the revolver found in his hand, and similar cartridges, to show the distance from the muzzle of the revolver at which hair and other substances were singed and powder-burned when the revolver was discharged at them. The court overruled defendant's objections to this evidence, and this is assigned as error. We are of the opinion that the evidence was competent.

5. Defendant assigns as error the overruling of its objections to the evidence given by various expert witnesses produced by plaintiffs, on the ground that it did not appear that they were sufficiently qualified as experts to testify. The only one of these rulings worthy of mention is that as to the young physician who testified that he was then practicing medicine, had graduated the year before at a medical college, and had given the question on which he was called special study. As has often been held by this court, the competency of an expert is a question of fact for the trial court, and an appellate court will not hold the finding of the trial court erroneous unless it is clearly so. The trial court did not err in holding the witness competent to testify as an expert.

6. Defendant assigns as error that the court charged the jury that plaintiffs could explain or contradict statements made in the proofs of death furnished by her to defendant. This has reference to statements as to the manner of death, not to the fact of death itself, or the time of death. We find nothing in the record showing what such proofs of death shall state, except the provision in the policy that the insurance money is payable "within ninety (90) days after receipt of satisfactory proofs of the death of said insured." We see no reason why the plaintiffs may not explain or contradict any such statement as to the manner of death as well as they can explain or contradict any other mere statement against their interest.

7. The remaining questions raised all go to the sufficiency of the evidence to sustain a verdict. The defendant claims that the evidence is conclusive that the insured died by his own hand. The

circumstances tend strongly to prove suicide, but we cannot say that they are conclusive. The burden of proof was on defendant to establish its defense. There is, as before stated, a conflict of evidence as to whether or not there were powder marks around the wound. There is a conflict of evidence as to whether one or two cartridges had been discharged from the revolver found in the hand of deceased. But one bullet wound was found on the body. Expert evidence was introduced tending to prove that it is very rarely that a suicide inflicts a wound on himself on the back of his person. Again, both parties are silent on this appeal as to the ownership of the revolver in question. We are of the opinion that the evidence does not conclusively prove suicide.

The orders appealed from are affirmed.

AMERICAN BAPTIST MISSIONARY UNION v. A. W. HASTINGS and Others.[1]

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January 27, 1897.

Nos. 10,318—(241).

Mortgage—Right to Acquire Tax Title.

Held, following Washington L. & T. Co. v. McKenzie, 64 Minn. 273, that the grantee of a mortgagor, who has covenanted to pay the taxes on the mortgaged premises, whether he is the immediate or remote grantee, or whether he gets his title by deed or through a second mortgage, is disqualified from acquiring and holding a tax title to the mortgaged premises, as against the mortgagee.

Reimbursement for Taxes.

Held, upon the special facts of this case, that equity did not require that the plaintiff should reimburse the grantee of its mortgagor for the amount paid by him for certain tax certificates of sale of the mortgaged premises.

Taxes—Payment under Protest.

The plaintiff herein paid certain money, under protest, to the county treasurer in redemption of the mortgaged premises from tax sales, the certificates whereof were held by a grantee of his mortgagor, but whose relation to the plaintiff's title did not appear of record. *Held*, following Joannin v. Ogilvie, 49 Minn. 564, that such payment was not a voluntary one.

[1] Reported in 69 N. W. 1078.

Appeal by defendant Weeks from an order of the district court for Hennepin county, Belden, J., denying a motion to dissolve a temporary injunction. Affirmed.

Geo. D. Emery, for appellant.

Weeks was simply a creditor having a lien, hence he could lawfully acquire an adverse tax title. Wilson v. Jamison, 36 Minn. 59, 29 N. W. 887; Allison v. Armstrong, 28 Minn. 278, 9 N. W. 806; Blackwood v. Van Vleit, 30 Mich. 118; Reimer v. Newel, 47 Minn. 237, 49 N. W. 865. Weeks was not an assign of the mortgagor. Cuilerier v. Brunelle, 37 Minn. 71, 33 N. W. 123; Nopson v. Horton, 20 Minn. 238 (269). Weeks, not being in possession and not having assumed any contractual duty toward the prior mortgagee, could not be required to pay the taxes. MacEwen v. Beard, 58 Minn. 176, 59 N. W. 942; Washington L. & T. Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976; Connecticut M. L. I. Co. v. Bulte, 45 Mich. 113, 7 N. W. 707.

Shaw, Cray, Lancaster & Parker, for respondent.

The cases cited by appellant are not directly in point. The following cases are conclusive against appellant's first point. Manning v. Bonnard, 87 Iowa, 648, 54 N. W. 459; Washington L. & T. Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976. See MacEwen v. Beard, 58 Minn. 176, 59 N. W. 942; Avery v. Judd, 21 Wis. 262; Smith v. Lewis, 20 Wis. 350.

START, C. J. This is an appeal by the defendant C. W. Weeks from an order of the district court of Hennepin county denying his motion to dissolve a temporary injunction, issued herein, restraining the defendant Cooley, as auditor of such county, from issuing a warrant to the defendant Weeks for the payment of the sum of $790.03, paid to the treasurer of such county by the plaintiff in redemption of certain land from tax sales, the certificates whereof were held by Weeks.

The material facts, as alleged in the complaint, and for the purposes of this appeal taken as true, are these: On June 14, 1889, William H. Barber was the owner of four lots in the city of Minneapolis, and on that day executed a mortgage on the lots to the plaintiff, to secure the payment of $20,000 in five years, with interest

payable semiannually. The mortgage was duly recorded, and contained a covenant by the mortgagor to pay all taxes levied on the mortgaged premises. Afterwards, and on June 24, 1889, Barber duly conveyed the lots to Albert S. Munger; and on the same day Munger conveyed them to J. H. Duffus. Each of these conveyances was by deed, in which it was expressly provided that the premises were conveyed subject to the plaintiff's mortgage. On June 27, 1889, Duffus executed a mortgage on the lots to the plaintiff's mortgagor, William H. Barber, to secure the payment of $10,000 and interest, who, on August 30, 1889, sold his mortgage (which was duly recorded) and the debt thereby secured to the defendants Cole and Weeks, as co-partners; but the assignment was taken for their benefit and use, in the names of Ward P. and Lizzie Shattuck. March 6, 1890, action was brought in the names of the Shattucks to foreclose this second mortgage; and the lots were sold pursuant to the decree to the Shattucks, and the sale confirmed by the court, July 18, 1891.

The taxes on the lots for the year 1889 became delinquent June 1, 1890, and on May 6, 1891, the lots were sold for such taxes to the state for the sum of $492.77; and May 26, 1891, Cole & Weeks purchased the tax certificates on such sale from the state, taking the assignment to C. W. Weeks. There was no redemption from the foreclosure sale on the junior mortgage, and on July 18, 1892, Cole & Weeks, as the beneficial owners, by virtue of such foreclosure, took possession of the lots, and so remained in possession thereof until December 17, 1895, and during all that time collected and received the rents and profits thereof, amounting in the aggregate to several thousand dollars, and paid the plaintiff from time to time the interest on its mortgage up to June 1, 1894, and paid the taxes levied on the lots during their possession thereof, except those for the year 1894. The plaintiff's mortgage was duly foreclosed by advertisement on December 17, 1894, and the lots sold to it for the amount of its mortgage and costs. No redemption was made from this sale.

The defendant Weeks, for Cole & Weeks, on November 26, 1895, caused notices of expiration of the time to redeem the lots from the tax sale for the taxes of 1889 to be served on their own tenants, who were in possession of the premises; and proof of the service of the notices was filed in the office of the county auditor on December 5, 1895. The plaintiff took possession of the premises December 17,

1895. The plaintiff had no knowledge that the notices of the expiration of the time to redeem had been issued, or that Cole & Weeks had not paid the taxes for 1889, or that either of them claimed any right or lien on the lots by reason of such tax sales until January 11, 1896. Neither Cole nor Weeks appear from the records to ever have had any interest in the lots except the assignment from the state of the tax certificates to Weeks, who appears upon the record to be a stranger to the plaintiff's title. Thereupon the plaintiff, to protect its title, paid under protest, on February 1, 1896, to the defendant Hastings, as county treasurer, the amount necessary to redeem from the tax sales, and thereby procured a cancellation of the certificates, and brought this action to recover the amount so paid, $790.03, and to restrain the defendant Cooley from issuing a warrant to Weeks for the amount.

The appellant, on these facts, claims: First. That he had a legal right to purchase at tax sale the mortgaged premises, and hold the tax title if no redemption was made, so as to defeat plaintiff's title derived through its mortgage. Second. If this be not so, still the plaintiff is bound in equity to reimburse him for the amount paid to protect the title from the paramount claim of the state for taxes. Third. That the plaintiff's redemption from the tax sales was a voluntary payment. If any one of these claims is valid, when tested by the record on this appeal, then the trial court erred in denying the motion to dissolve the injunction.

1. The first claim of the appellant is determined adversely to him by the decision of this court in the case of Washington L. & T. Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976. When Cole & Weeks took an assignment of the tax certificates in the latter's name, they were, in fact, the owners of the second mortgage, which was in process of foreclosure; and, by virtue thereof, they became the beneficial owners of the mortgaged premises, subject to the plaintiff's mortgage. When Cole & Weeks became such owners of the property, they, or the Shattucks for them, held precisely the same title which the plaintiff's mortgagor, Barber, had after he gave the first mortgage, and therein covenanted to pay the taxes on the premises. Barber's title, subject to plaintiff's mortgage, passed to his immediate grantee, Munger, from him to Duffus, from him to Barber, as mortgagee in the second mortgage, and from him to Cole & Weeks,

by assignment of the second mortgage to the Shattucks for their use and benefit. They were such owners of the premises, and in possession thereof, when they attempted to perfect their alleged tax title, by causing notices of expiration of time for redemption to be issued and served. As the grantees of Barber, they could not acquire and hold a tax title to the mortgaged premises, as against plaintiff's mortgage. The fact that they were the remote, instead of immediate, grantees of Barber, does not distinguish this case from the case of Washington v. McKenzie, supra.

2. As to the appellant's second claim, it may be conceded that the burden was on the plaintiff to show that it would be inequitable to permit Cole & Weeks to retain the tax certificates as security until reimbursed the amount paid for them, for the reason the plaintiff's title was thereby protected against the paramount claim of the state for taxes, for the payment of which they were not personally bound. But, if this be so, still the complaint alleges facts sufficient to make a prima facie case in this particular, which, being admitted, shifts the burden upon Cole & Weeks to show that, in equity, they ought to be so reimbursed. They were in possession of the mortgaged premises for three years and five months, and received the rents and profits therefrom, amounting in the aggregate to several thousand dollars, a sum largely in excess of the sum paid by them for the tax certificates. They paid no interest on plaintiff's mortgage or taxes on the premises for more than a year before they surrendered possession of the premises to the plaintiff. Equitably, they ought to have applied so much of the rents and profits as was necessary to the payment of all taxes and tax liens on the premises; and not have permitted the accumulation of interest on their certificates; and equity will regard that done which ought to have been done, and treat the tax certificates as paid from the rents and profits coming to the hands of Cole & Weeks, in the absence of any other equitable considerations.

3. The plaintiff's redemption from the tax sales was not a voluntary payment. The defendant Weeks appeared upon the records to be a stranger to the title of the plaintiff; hence he appeared on the records to be the owner of an inchoate tax title, which would become absolute as to all the world in a few days, unless a redemption was made. There was no time left to the plaintiff in which to commence

an action, and make proof of the extrinsic facts showing that, as against the plaintiff, Weeks was disqualified to acquire such absolute title to the premises by virtue of such tax sales and certificates. There was, then, but one way left for the plaintiff to prevent a cloud upon its title, and that was to do just what it did do,—redeem and pay the money under protest. The plaintiff was not bound to permit a cloud to be placed on its title, and take its chances of being able to establish the extrinsic facts entitling it to have the cloud removed by the judgment of a court of equity at the end of a law suit, leaving its title clouded pending the litigation. The rule that money voluntarily paid cannot be recovered back is a wholesome one, but in its application injustice is too frequently done. The subject was fully considered by this court in the case of Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217. The case cited is decisive of the one at bar, on the point now under consideration.

Order affirmed.

STEPHEN MAHONEY v. JOHN P. BARBER.[1]

January 27, 1897.

Nos. 10,324—(229).

Promissory Note — Accommodation Maker — Fraudulent Purpose — Misapplication of Collaterals.

Held, upon a consideration of the pleadings and evidence, that there was no competent evidence in this case to show that the defendant was an accommodation maker of the note sued on, or that the note was given for an unlawful and fraudulent purpose, or that the holder thereof diverted and misapplied the collaterals pledged as security for the payment of the note.

Held, further, that the trial court rightly directed a verdict for the plaintiff.

Appeal by defendant from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

Wm. H. Donahue and *S. Meyers*, for appellant.

Stephen Mahoney, for respondent.

[1] Reported in 69 N. W. 886.

START, C. J. The plaintiff is the assignee in insolvency of the Irish-American Bank, and brought this action to recover on a $5,000 note made by the defendant to the bank. The trial court, at the close of the evidence, directed the jury to return a verdict for the plaintiff for the amount due on the note, and the defendant appeals from an order denying his motion for a new trial.

The original answer admitted the making of the note, and alleged that it was made without consideration, and for the accommodation and benefit of the payee, at its request; that the payment of the note was secured by certain collaterals, which the bank still holds; and that the note has been paid in full. On the trial the answer was amended by adding the allegations that the note in question was given in renewal of a prior one, of like import, which was secured by certain stock and promissory notes of the Matt Walsh Wine Company, and that the bank, after such renewal, surrendered the collaterals to the wine company. The reply admitted that the bank received the collaterals, but put in issue the other allegations of the answer, and alleged that the collaterals were of no value. The answer does not allege that the defendant made the note as surety for either Matt Walsh or the wine company, or that the collaterals were surrendered without the consent of the defendant. The plaintiff objected to any evidence being received to show that the defendant was a surety on the note, because no such defense was pleaded. The objection was overruled, and he excepted. Upon the pleadings and evidence the trial court rightly directed a verdict for the plaintiff.

The defendant claims that the evidence made a case for the jury upon the following questions:

1. Whether the note was made for the benefit and accommodation of the payee. The evidence shows that Walsh was indebted to the bank in the sum of about $40,000, and was owing other creditors some $8,000, upon which he was being pressed. He consulted the bank officers, and the subject of his making an assignment was discussed, and the cashier of the bank stated that such a course might injure the bank, and suggested a compromise with creditors. A composition agreement was accordingly secured from the creditors, who agreed to take 30 per cent. of their claims. To pay creditors other than the bank the amount agreed on, it was necessary for Walsh to borrow $5,000. The bank was unwilling to loan any more

money on his own note, and it was arranged that the defendant, the son-in-law of Walsh, should give his note for the money to be loaned. The defendant gave his note to the bank, and the amount was placed to his credit. At the same time he gave a check to Walsh for the amount, who indorsed the check to the bank, the amount was credited to him, and he afterwards checked it out. No part of the proceeds of the note ever went to the bank, directly or indirectly. This evidence furnishes no basis for the claim that the note was without consideration, or for the claim that the defendant gave the note for the benefit and accommodation of the payee.

2. Whether the bank diverted or misapplied the collaterals received by it to secure the note. The plaintiff duly objected to any evidence on this question, because it was not admissible under the pleadings. The objection was overruled, and exception taken. Waiving the question of the sufficiency of the answer, it is sufficient to say that there was no competent evidence in the case to support the claim. It is undisputed that the collaterals have never been surrendered, and that they remained with the bank until it suspended, and that its assignee, the plaintiff, now has them. But the defendant claims that the bank has rendered the collaterals worthless by taking possession of all of the property of Walsh and of the wine company through a trustee, and misappropriating it. The only basis for this claim is that the parties named made a trust deed of their property to James H. Bishop for the benefit of their creditors. The bank was a party to the deed, and agreed thereby that the other creditors should be preferred. The trustee for the creditors took possession of the property so conveyed to him. There is no evidence that he was trustee for the bank, or took the property for it, or that the bank or the plaintiff has as yet received anything from the property or proceeds turned over to the trustee.

3. Whether the note was given for an unlawful and fraudulent purpose. There is evidence tending to show that it was understood, between Walsh and the bank, that it should sign the composition agreement, and that he should, notwithstanding the agreement, pay in full the bank's claim. There is no intimation in the pleadings of any such defense, and the question was not raised until after the close of the evidence. But, this aside, there is nothing in the point. If the note in question had been given pursuant to the alleged secret

understanding to pay the whole or any part of the bank's debt against Walsh, which it had agreed to release by the composition agreement in excess of the 30 per cent., we should have something to discuss. Such, however, is not this case. The note was given for money borrowed, and every dollar of it was used by Walsh in paying creditors other than the bank.

Order affirmed.

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PLYMOUTH CORDAGE COMPANY v. F. A. SEYMOUR and Others.[1]

January 27, 1897.

Nos. 10.345—(281).

Corporations—Insolvency—Preferred Claims—Right to Collaterals.

Corporations A. and B., each a creditor of D., a third corporation, whose respective claims were due, agreed that, if B. would extend the time of the payment of its claim, it should under all circumstances be preferred, and paid its claim in full, before any payment should be made or demanded on the claim of A. The contract was made at the solicitation of D., and for its benefit. B., at the request of D., extended the time of payment of its claim, pursuant to the contract. Afterwards a receiver was appointed of the property of D. under the insolvency laws of this state. A. and B. proved their respective claims. *Held*, that B. is equitably entitled to be paid the dividends on A.'s claim until B.'s claim is paid in full, but that B. is not entitled to have paid to it the proceeds of certain notes, collateral, transferred to A. before the contract was made.

Same—Dividends.

Upon the findings of fact herein, *held* that B.'s equitable right to such dividends is superior to any claim thereto of any of the trustees or receivers defendant.

Appeal by defendants Walter A. Wood Mowing & Reaping Machine Company and Van Santvoord and another, its receivers, and Cheney and another, trustees, from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial. Modified.

[1] Reported in 69 N. W. 1079.

Young & Lightner, for appellants.
Ripley & Brennan, for respondent.

START, C. J. The solution of the questions raised by this appeal depends upon the construction to be given to the contract designated as "Exhibit A" in the record. This contract relates to the affairs of the plaintiff, the Plymouth Cordage Company, a Massachusetts corporation, (hereinafter referred to as the "Cordage Company,") the Walter A. Wood Mowing & Reaping Machine Company, a New York corporation, (hereinafter called the "New York Company,") and the Walter A. Wood Harvester Company, a Minnesota corporation, having its principal place of business at St. Paul, and hereinafter styled the "St. Paul Company."

On March 21, 1894, the New York Company, as the party of the first part, and the Cordage Company, as the party of the second part, duly executed the contract here in question, at the solicitation and with the knowledge of the St. Paul Company. It is admitted that the recitals in the contract are all true. The contract first recites that the St. Paul Company is indebted on demand notes to the party of the first part in the sum of $339,000, and that it is also indebted to the party of the second part on open account, which is due, in the sum of $489,390, and that the St. Paul Company would be greatly embarrassed if immediate payment of such indebtedness was demanded by the respective parties, and it desired an extension of the time of payment of such indebtedness by each of the parties, to the end that it might continue its business profitably, and realize upon its assets to the best advantage without loss. The balance of the contract is in these words:

"The first party is the owner of a very large amount of the capital stock of the said Walter A. Wood Harvester Company, and has confidence in the ability of said Harvester Company to pay its indebtedness in full, if granted additional time therefor, and has expressed to the second party its willingness, not only to extend the time for payment of said Harvester Company's indebtedness to the first party hereto, but also to consent that, under all circumstances, the indebtedness of the said Harvester Company to the second party shall be paid in full, before any payment shall be made on account of said Harvester Company's said indebtedness to the first party:

"Now, in consideration of the premises, and of said second party's extending the time of payment of said Harvester Company's indebt-

edness to it, at the request of the first party, it is agreed between the parties hereto and the said Walter A. Wood Mowing & Reaping Machine Company, for itself, agrees that, under all circumstances, the present indebtedness, and every part thereof, including interest, of the said Walter A. Wood Harvester Company to said Plymouth Cordage Company shall be preferred to, and shall be paid in full, before any payment shall be due and demanded on account of the aforesaid indebtedness of said Walter A. Wood Harvester Company to said Walter A. Wood Mowing & Reaping Machine Company; it being the understanding between the parties hereto, and the intent of this instrument, that the aforesaid indebtedness of said Harvester Company to said Plymouth Cordage Company shall be paid and discharged in full, before any payment whatever shall be made or demanded on account of said existing indebtedness of said Walter A. Wood Harvester Company to said Walter A. Wood Mowing & Reaping Machine Company."

At the time this contract was made the New York Company was, and ever since has been, the owner of a majority of the stock of the St. Paul Company, and it then held, as security for the payment of its debt against the latter, collateral bills receivable, being farmers' notes, transferred to the New York Company by the St. Paul Company for that purpose, to the amount of more than $400,000. The Cordage Company had no security for its debt, and it extended the time of the payment thereof at the request of the St. Paul Company, as agreed in Exhibit A. After the execution of the contract the New York Company, to enable the St. Paul Company to continue its business, surrendered to it all of the $400,000 of collateral notes except $109,000 thereof, and its original debt of $339,000 and interest remained unpaid on March 18, 1895, on which date the defendants Seymour and others were appointed by the district court of Ramsey county receivers of the property of the St. Paul Company in insolvency proceedings. The Cordage Company's original debt of $489,390 was reduced by payments made by the St. Paul Company, so that, at the time the receivers were appointed, it amounted to $73,466. Both companies made proof of their respective claims in the insolvency proceedings, and they were allowed.

On February 9, 1895, the New York Company, to secure a loan then made to it, pledged $300,000 of its indebtedness of $339,000 against the St. Paul Company, evidenced by demand notes, with a proportionate amount of the $109,000 collaterals remaining in its hands, to the defendant trustees, Cheney and Geer. The pledge of the collat-

erals was authorized by the St. Paul Company. Shortly after the receivers of the St. Paul Company were appointed an arrangement was made between them and the New York Company whereby the latter turned over to them $83,000 of the notes collateral held by it and the trustees, for collection and remittance. A portion thereof was so collected and remitted by the receivers before the commencement of this action. In December, 1895, the defendants Van Santvoord and Geer were appointed by the supreme court of New York receivers of the property of the New York Company in proceedings for its dissolution as an insolvent corporation.

The Cordage Company brought this action to restrain the receivers of the St. Paul Company from paying to any other of the defendants any dividends upon the claim allowed to the New York Company, or any money in the receivers' hands collected on the collateral notes in their hands, and to require them to pay to the Cordage Company all such dividends and money until its claim against the St. Paul Company is paid in full. The trial court directed judgment for the plaintiff for such relief, and the defendants the trustees, the New York Company, and its receivers appealed from an order denying their motion for a new trial.

The meaning of Exhibit A lies upon the surface. Its language is plain and unambiguous, and clearly expresses the intention of the parties. It speaks from its date, and does not purport to modify anything theretofore done or secured by either party with reference to their respective claims against the St. Paul Company. There is not a suggestion in the contract that, as claimed by the plaintiff, the New York Company should surrender its existing securities for the payment of its debt to the St. Paul Company, or that the Cordage Company should have an equitable lien on, or an assignment (equitable or otherwise) of, the New York Company's debt against the St. Paul Company, or of the collateral notes then held by the New York Company. The contract conferred on the Cordage Company no right or equity to the collaterals pledged prior to the execution of the contract. The fact that the New York Company did afterwards surrender a large part of such securities to the St. Paul Company, whereby the Cordage Company was benefited, does not justify the inference that the parties so agreed; for the language of the contract forbids such a construction. Besides, the trial court found

that the collateral notes were so surrendered to enable the St. Paul Company to continue its business.

On the other hand, the claim of the defendants, to the effect that the agreement of the New York Company, as expressed in this contract, is a mere personal covenant, for the breach of which an action for damages is the only remedy, is equally untenable. It is true that a covenant by a debtor to pay his creditor out of a designated fund, of which the debtor retains control, when the same is received by him, is a personal covenant only, and cannot be construed either as an equitable assignment of, or a lien on, the fund. The authorities cited by the defendants fully support this proposition. Rogers v. Hosack, 18 Wend. 319; Christmas v. Russell, 14 Wall. 69.

Such, however, is not this case, wherein the covenant is, not to pay out of a particular fund when received, or to pay at all, for that matter, but one as to the priority of the payment of the claims of the respective parties by and out of the assets of their common debtor. To construe this as merely a personal covenant would be contrary to the intention of the parties, expressed in their contract, and inequitable. At the time the contract was made the common debtor was insolvent, within the legal meaning of the term, if not in fact. It then owed the parties to the contract over $800,000, all of which was then past due. The interest of the New York Company, as a large stockholder of the St. Paul Company, in keeping the latter a going concern, was very great,—much greater than that of the Cordage Company. And to secure this result the New York Company induced the Cordage Company to forego its then existing right to enforce its claim by a covenant to the legal effect that the claim of the Cordage Company should, under all circumstances, have priority, and be paid in full from the then and future assets of the common debtor, before anything should be paid to the New York Company on its claim, or any of such assets appropriated to such payment. Relying on this covenant, the Cordage Company performed its part of the contract by extending the time of the payment of its claim against the common debtor, at its request.

Thereupon, in equity, as between these two creditors, the right of priority of payment and preference in the application of the assets of the debtor attached to the claim of the Cordage Company, and the corresponding burden of posteriority attached to the claim of the

New York Company. This equity was to be recognized and enforced under all circumstances. Hence, the fact of the insolvency of the St. Paul Company and that of the New York Company does not affect this equity, except that it affords an additional reason why the covenant should not be construed to be personal only, and why the court should enforce the equity so far as practicable.

There is no practical obstacle in the way of enforcing this equity. If there were no other creditors of the St. Paul Company save the parties to this contract, then the net proceeds of the assets of the insolvent would, in the absence of the contract, be distributed pro rata; but, when the contract is brought into the case, the court ordering the dividend will enforce the equity by treating the Cordage Company as a preferred creditor, and the New York Company as a general creditor, because the parties have so agreed. It would be, not only inequitable to refuse so to give effect to the contract, but a fraud on the Cordage Company, after it had performed on its part, and when it was impossible to restore to it what it parted with, and for the loss of which it could not be compensated in damages.

The fact that these two creditors are not the only ones who have proved their claims against the estate of the St. Paul Company, and are entitled to share in its assets, does not change the rights of the parties, or materially enhance the difficulties of enforcing the Cordage Company's equitable right to priority and preference as to its claim over that of the New York Company. The amount of the assets of the insolvent, which these two creditors together are entitled to receive and apply in payment of their respective claims in the order provided by their contract, equals the sum of their respective dividends. When this sum is ascertained and segregated from the fund in the hands of the receivers for distribution, by means of a pro rata dividend on all of the claims proved, the court can distribute the sum so ascertained between these creditors in accordance with their contract, by treating the claim of the Cordage Company as a preferred one, to be paid in full before anything is paid on the claim of the New York Company. Precisely the same result follows from the direction given by the trial court to the receivers to pay the sum of the dividends of both creditors on their respective claims directly to the Cordage Company until its claim is paid in full. This method, adopted by the trial court to enforce the con-

tract, avoids all circumlocution. It is simple, just, and sustained by the law of this case, as between the original parties to the contract.

But the defendants urge that the Cordage Company's right to priority ought not to be enforced as against the receivers of the New York Company. The facts were stipulated in this case, and were found by the trial court as agreed upon. It does not appear, from the findings, that the receivers, in their representative capacity, have any equity superior to that of the New York Company.

It is further claimed that the trustees Cheney and Geer, as trustees for certain creditors of the New York Company, occupy the position of bona fide purchasers as to $300,000 of the St. Paul Company's indebtedness to the New York Company, pledged to such trustees, and that their equities are paramount to those of the plaintiff. The indebtedness so pledged was in the form of demand promissory notes, which were past due some 16 months when they were pledged to the trustees. This fact, it is claimed by plaintiff, charged the trustees with notice of the plaintiff's equitable right to priority of payment from the assets of the common debtor.

The mere fact that the notes were past due when they were pledged to the trustees is not, it would seem, sufficient to charge them with notice of the equity of the plaintiff, a third party. The general rule is that a purchaser of past-due commercial paper takes it subject to all equities existing between the parties to the paper, but not to any latent equities in favor of a third party. A purchaser, however, with notice thereof, acquires only the title of his assignor; and the burden rests upon such purchaser to bring himself within the rule in favor of bona fide purchasers. He is bound to deny notice of the prior equity, and prove his want of notice. This fact rests within his own knowledge. Newton v. Newton, 46 Minn. 33, 48 N. W. 450. Want of notice may be inferred from the payment of a valuable consideration where the transaction occurs in the ordinary course of business and is free from suspicious circumstances. But the court or jury are not bound to find want of notice from the mere fact that a valuable consideration was paid, for he who claims the rights of a bona fide purchaser must prove, not only that he paid a valuable consideration, but also that he purchased without notice. Bank of Farmington v. Ellis, 30 Minn. 270, 15 N. W. 243.

There is no finding in this case that the trustees, or the creditors whom they represented, did not have notice of the contract here in question, or any finding from which such want of notice would be necessarily inferred. Neither is there any direct finding that the creditors represented by the trustees have not been paid in full; but, this aside, the findings of fact, taken as a whole, fail to show that either the trustees or the creditors whom they represent have any right or equity in the premises superior to that possessed by the New York Company.

It follows that so much of the conclusions of law by the trial court as directs the payment of the dividends on the claim of the New York Company to the Cordage Company until its claim is paid in full must be affirmed, and that so much thereof as relates to the payment to the Cordage Company of the proceeds of the collateral notes must be reversed. No new trial is necessary.

The case must be remanded, with directions to the trial court to modify its conclusions of law so as to direct that the sum of the dividends of the New York Company and the Cordage Company on their respective claims be paid by the receivers to the Cordage Company until its claim is paid in full, and that thereafter the sum of the dividends, if any, on the respective claims, be paid to the New York Company. So ordered.

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ST. ANTHONY FALLS BANK v. ARTHUR GRAHAM and Another.[1]

January 27, 1897.

Nos. 10,367—(237).

Appealable Order.

The plaintiff made an alternative motion for judgment notwithstanding the verdict, pursuant to Laws 1895, c. 320, or for a new trial. The trial court made its order denying the first request, and granting the plaintiff a new trial. The plaintiff appealed from the part of the order denying its motion for judgment. *Held*, that no appeal lies from such part of the order.

[1] Reported in 69 N. W. 1077.

Appeal by plaintiff from that part of an order of the district court for Stearns county, Baxter, J., which denied its motion for judgment notwithstanding the verdict. Dismissed.

A. A. Stone, for appellant.

Miner & Barto and *D. T. Calhoun*, for respondent.

START, C. J. This is an action on a promissory note made by defendants. The answer alleges that the defendants signed the note when they were intoxicated. The trial court ordered a verdict against the defendant Arthur Graham for the amount of the note, and the jury returned a verdict in favor of Thomas Graham. The plaintiff then made an alternative motion for judgment in its favor against Thomas Graham notwithstanding the verdict, or for a new trial as to such defendant. The trial court denied so much of the motion as asked for judgment absolute, and granted a new trial. The plaintiff appealed from so much of the order as denied its motion for judgment.

The contention of the respondents that the order is not appealable is sustained. An order granting or denying a motion for judgment notwithstanding the verdict, made pursuant to Laws 1895, c. 320, is simply an order for judgment or one refusing a judgment, and it is therefore, standing alone, not appealable. Ames v. Mississippi B. Co., 8 Minn. 417 (467); McMahon v. Davidson, 12 Minn. 232 (357); Rogers v. Holyoke, 14 Minn. 387 (514); Croft v. Miller, 26 Minn. 317, 4 N. W. 45; State v. Bechdel, 38 Minn. 278, 37 N. W. 338. Such an order can only be reviewed by appeal from a judgment or from an order granting or denying a motion for a new trial, except that, when the motion for judgment is blended with a motion for a new trial, pursuant to Laws 1895, c. 320, on an appeal from the order disposing of such motion the action of the trial court in directing or refusing judgment regardless of the verdict may be reviewed. Kernan v. St. Paul C. R. Co., 64 Minn. 312, 67 N. W. 71.

If the party moving for judgment notwithstanding the verdict does not desire a new trial, but to stand upon the record, he should move for judgment without asking for the alternative relief of a new trial. Then, if either party wishes to review the order made on such motion, he can have judgment entered in accordance with the order, —that is, on the verdict or notwithstanding it,—and appeal from

the judgment, and have the order reviewed as an intermediate one affecting the merits. But if the defeated party is unwilling to stand or fall on his claim to a judgment in his favor upon the record as a matter of strict legal right, he may blend his motion for judgment with one for a new trial. If his motion is wholly denied, he may appeal from the order, and review the action of the trial court upon either or both of the alternative motions so united. If any part of his motion is granted, the adverse party may appeal from the order disposing of the motion. Kernan v. St. Paul C. R. Co., supra.

Where, however, as in the case at bar, the trial court grants the alternative request of the moving party for a new trial,—a matter resting in a large measure in the discretion of the court,—and denies the balance of the motion, he cannot, after securing a new trial, appeal only from so much of the order as denied his alternative motion for judgment, leaving the order for a new trial in full force. The effect of the unconditional order in this case for a new trial is to entirely set aside the trial, with all its evidence and proceedings, and the case now stands for trial precisely as if no trial had ever been had. There are now in the case no proceedings or evidence upon which a judgment can be based. Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366.

Whether the plaintiff, by appealing from the whole order, might have reviewed the action of the court in denying its motion for judgment, it is unnecessary for us to here decide, but it would seem that, if it did not want a new trial, it ought not to have asked for it. However this may be, it is clear that it cannot accept the part of the order annulling the trial and granting it a new one, and appeal from the part which denies its motion for judgment.

Appeal dismissed.

HANNAH A. HOLCOMB v. INDEPENDENT SCHOOL DISTRICT OF DULUTH.[1]

February 1, 1897.

Nos. 10,249—(255).

Dower—Estoppel—Evidence.

The plaintiff's husband, in 1877, while living apart from her,—he at Duluth, she in the state of Michigan,—conveyed the lot here in question to P. by his sole deed, which was recorded, and wherein he represented and recited that he was unmarried. He was so reputed at Duluth until his death, in 1882, when the plaintiff came to Duluth, remaining six months, during which time the defendant was in possession of the lot as a site for its schoolhouse, having acquired, as it supposed, the entire title from P. by condemnation, for which it paid him its then full value. While at Duluth plaintiff learned of this deed and record, and the representation therein made, but gave no notice of her claim to the lot, or that her husband was not a single man, to the defendant or any one else, and abandoned the lot, went back to Michigan, and never asserted any claim thereto until the commencement of this action in 1895. In the meantime the lot increased in value tenfold, and the defendant, in good faith relying on the representation in the deed, built, on a site of which this lot is a part, a new high school building at a cost of $350,000.

Held, that the plaintiff is now estopped by her conduct from asserting any title to the lot.

Held, that it was not error for the trial court to receive evidence to the effect that the husband was generally reputed to be a single man.

Evidence considered, and *held* sufficient to sustain the findings of fact herein.

Appeal by plaintiff from an order of the district court for St. Louis county, Morris, J., denying a motion for a new trial. Affirmed.

White & McKeon, for appellant.

In condemnation proceedings a judgment can bind a person only when he is a party to the proceedings. When an interested party is omitted the proceeding is nugatory as to him. State v. Easton & A. Ry. Co. 36 N. J. Law, 181; Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190, 3 South. 23; Smith v. Chicago, A. & St. L. R. Co., 67 Ill. 191; Lane v. Miller, 17 Ind. 58; Garmoe v. Sturgeon, 65 Iowa, 147, 21 N. W.

[1] Reported in 69 N. W. 1067.

493; Detroit, M. & T. R. Co. v. Detroit, 49 Mich. 47, 12 N. W. 904; Hagar v. Brainerd, 44 Vt. 294; Moore v. Mayor, 8 N. Y. 110. But see Lewis, Em. Dom. § 323. Estoppel in pais can be invoked only when a party has been guilty of no fraud. Titus v. Morse, 40 Me. 348.

Walter Ayers, for respondent.

It is competent for the legislature to authorize land to be condemned by a municipal corporation and devest any inchoate right of dower. 2 Dillon, Mun. Corp, § 594; Moore v. Mayor, 8 N. Y. 110; Simar v. Canaday, 53 N. Y. 298; Wheeler v. Kirtland, 27 N. J. Eq. 534; Randolph, Em. Dom. § 302; Morrison v. Rice, 35 Minn. 436, 29 N. W. 168. The language of the statute under which the condemnation was made is the same or similar to the acts construed in New York and New Jersey.

The statute of limitations has run against the claim of plaintiff. G. S. 1894, § 5134; Seymour v. Carli, 31 Minn. 81, 16 N. W. 495.

The widow takes as heir of her husband. Scott v. Wells, 55 Minn. 274, 56 N. W. 828; In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115; G. S. 1894, § 4469. When title against the husband is obtained by adverse possession for fifteen years, the widow is bound by the adverse title secured against her husband.

START, C. J. This is an action for partition of a lot in the city of Duluth, of which the plaintiff claimed to be the owner of one undivided third, and conceded that the defendant was the owner of the other two-thirds. The trial court found that the defendant owned the whole lot, and ordered judgment accordingly. The plaintiff appealed from an order denying her motion for a new trial.

The errors assigned, stated concisely, are that the trial court erred in its rulings on the admission of evidence, that it erred in its findings of fact, and that its conclusion of law is not justified by the facts found. The alleged errors will be considered inversely.

1. The material facts, as found by the trial court, are: The plaintiff is the widow of Martin T. Holcomb, who died April 25, 1882, at Duluth, where he had resided for eight to ten years next before his death. The plaintiff never resided with or visited her husband at Duluth, but during the time stated she lived in the state of Michigan. Holcomb, during his residence at Duluth, was reputed to be an unmarried man, and so represented himself. He was the owner of the

lot in question, and on April 4, 1877, conveyed it to Michael Pastoret by warranty deed, which was duly recorded, and in which he described himself as an unmarried man. The defendant, July 29, 1881, condemned the lot for a schoolhouse site; but in its proceedings for that purpose Pastoret only was made a party, as he was the only person claiming the lot, or appearing of record to have any title thereto. The damages for the entire lot were assessed at $200, its then full value. The defendant paid this total amount to Pastoret September 21, 1881, and immediately went into possession of the lot, and proceeded to erect a schoolhouse upon the lot and others adjoining it. Only a part of the building was on the lot in question. The defendant has ever since been in the possession of the lot.

Shortly after her husband's death, and in the year 1882, the plaintiff came to Duluth and remained six months, during which time she had an administrator appointed on her husband's estate, and caused an investigation to be made as to the property which her husband had left, and the condition thereof. For this purpose she employed the administrator and an attorney at law, and was informed at this time, by each of them, after such investigation, that her husband had at one time owned the lot in question, and had conveyed the same, describing himself in the deed as an unmarried man. She also learned, during this visit to Duluth, that her husband had there held himself out to be a single man, and was so reputed to be, and that as such he had conveyed real estate belonging to him in the counties of St. Louis and Carlton; but she asserted no claim to such real estate, or gave notice of the fact that her husband had not been a single man, as claimed by him, and returned to Michigan in the year 1882, where she has since continuously resided. The value of the lot at this time was not to exceed $200, but it is now of the value of $2,250. The reason why the plaintiff gave no notice of her claim to the lot as the widow of Holcomb was that she deemed it of too little value to warrant proceedings for the establishment of her claim.

The defendant, in the year 1890, caused the schoolhouse first erected on the lot to be torn down, as inadequate, and erected upon this lot and adjoining ones a high school building at a cost of $350,000. The value of so much of this building as rests upon the lot in question is $18,000. The building cannot be divided. The defendant paid Pastoret for the lot, and took possession thereof, and has

ever since held it, and erected the two schoolhouses thereon in good faith, in reliance on the representation of Holcomb, in his deed, that he was an unmarried man, and never had any notice that he was not then unmarried, or of the plaintiff's claim to the lot, until shortly before the commencement of this action, in November, 1895. The foregoing are substantially the facts as found by the court.

The plaintiff, however, while conceding that she never asserted any claim to the lot until 1895, denies that she ever knew, prior to 1895, that her husband had made any conveyance of the lot. She also disclaims in this action any right to the improvements on the lot, and asserts no claim for actual partition of the premises, but claims that she is entitled to be paid one-third of the present value of the lot, excluding improvements. The form of the action, or the present claims or concessions of the plaintiff, can have but little, if any, bearing upon the question of the title to this lot,—a question which must be determined upon the facts found by the trial court, without reference to the form of the action. Assuming the facts found to be sustained by the evidence, the conclusion follows that the plaintiff, in 1882, advisedly abandoned her interest in the lot, and is equitably estopped by her conduct from now asserting title to the lot to the prejudice of the defendant. Bausman v. Faue, 45 Minn. 412, 48 N. W. 13; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495.

The equitable doctrine of estoppel by conduct was discussed in the Dimond case, and the general principles upon which it rests stated in these words:

"First. To create an estoppel, the conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act. Second. It is not necessary that the facts be actually known to a party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed to him. Third. It is not necessary that the conduct be done with a fraudulent intention to deceive, or with an actual intention that such conduct will be acted upon by the other party. It is enough that the conduct was done under such circumstances that he should have known that it was both natural and probable that it would be so acted upon."

The facts of this case, as found by the court, clearly bring it within the rules stated. The plaintiff's husband, while he was living in one state and she in another, passes himself off as a single man, and conveys the lot as such, representing, on the face of the deed, that

he is unmarried, which representation is spread upon the records of land titles,—a continuing representation, to all parties dealing with the title to the lot, that he then had no wife, and that the entire title passed by the deed. The defendant, in reliance upon such representation, acquired, as it believed, the entire title to the lot, and paid the full value therefor, and goes into possession of the premises, and uses them for public school purposes. After her husband's death, the plaintiff learns these facts. She then knows that, because the representation was and is false, she owns one-third of the lot. She then knew, or was bound to know, that the defendant was relying upon the representation as true, and that it would continue so to do until it learned that the representation was false. Yet, because her interest was then worth less than $70, a sum she deemed insufficient to justify any assertion of her claim, she abandons it, fails to undeceive the defendant, leaves the state, pays no taxes on the lot, asserts no claim to it, and keeps silent for 13 years. Then, after the lot has increased in value more than tenfold, and has become a part of the site of a $350,000 schoolhouse, she for the first time asserts her claim.

The plaintiff, however, claims that, inasmuch as the defendant purchased the lot, and went into possession thereof, before she knew that her husband had conveyed it as an unmarried man, and no claim being made by her in this action for any part of the improvements on the lot, the defendant has not been prejudiced by her conduct. This claim ignores the fact that, if the plaintiff had asserted her title to the lot when she first learned that, by reason of her husband's false and continuing representation, she owned one-third of the lot, the defendant's officers would not, as reasonable and prudent men, have continued to use the lot as a part of the site of defendant's high school building, upon which was subsequently erected its new building, without acquiring her interest in the lot, by purchase or condemnation, which they might then have done on payment of $70, the then value of her interest. If she is now permitted to assert her title, the defendant, at the very least, must pay ten times $70 to perfect its title, and her interest will have escaped taxation for at least 13 years. The trial court's conclusion of law is sustained by its findings of fact.

2. But the plaintiff assigns as error that the facts found by the

court as to her knowledge, in 1882, that her husband at one time owned this lot, and had conveyed the same, representing in the deed that he was a single man, are not justified by the evidence.

The plaintiff testified that she never knew that her husband ever owned or conveyed this lot until the winter of 1895. She admits that she came to Duluth, as found by the trial court; but there is no denial on her part that she had an administrator of her husband's estate appointed, and that he and her attorney investigated and reported to her as to what real estate her husband had, in his lifetime, owned and conveyed. Both the administrator and the attorney were witnesses on the trial. Neither of them was able to give the details of any conversations had with the plaintiff after the lapse of so many years, but each testified to facts from which those found by the court might naturally and reasonably be inferred, especially as there was no contradiction of their testimony, other than the plaintiff's bare denial that she ever knew anything about this lot until 1895. The findings of fact are sustained by the evidence.

3. The other assignments of error relate to the rulings of the trial court on the admissions of evidence.

Those relating to the condemnation proceedings it is unnecessary to discuss, as our conclusion in this case is based upon the concession that such proceedings did not extinguish the plaintiff's title to the lot.

It is assigned as error that the court erred in receiving evidence tending to show that the plaintiff's husband, while living in Duluth, was generally reputed to be an unmarried man, and that he executed deeds, including the deed of the lot in question, in which he represented himself to be a single man. This evidence was properly received as bearing on the question of estoppel. It was competent and material, as tending to show that the defendant and Pastoret, through whom the defendant claims title to the lot, were justified in relying upon the representation, in the deed and record, that the grantor was unmarried, and as a foundation for the admission of the further evidence tending to show that the plaintiff was informed of the facts which the evidence objected to tended to establish.

Order affirmed.

BURLINGTON MANUFACTURING COMPANY v. BOARD OF COURTHOUSE & CITY HALL COMMISSIONERS.[1]

February 1, 1897.

67 327
83 519

Nos. 10,345—(254).

Public Building—Mechanic's Lien.

Held, a subcontractor who furnished material for the erection of the building known as the "New Courthouse and City Hall," being erected for Hennepin county and the city of Minneapolis, cannot acquire a mechanic's lien on the building, or the land on which it is being erected.

Same—Judicial Notice.

Held, this court will take judicial notice of the acts of the legislature providing for the erection of said building.

Same—Constitution.

Held, the last proviso of section 12 of article 1 of the constitution, as amended in 1888, does not give any lien on such a building, or any right of seizure and sale of the same, for material so furnished.

Appeal by plaintiff from an order of the district court for Hennepin county, Smith, J., sustaining a demurrer to the complaint. Affirmed.

Geo. Burt Spencer, for appellant.

Daniel Fish, for respondent.

CANTY, J. 1. Appellant is a subcontractor who furnished material for the erection of the new courthouse and city hall building in Minneapolis, and brought this action to enforce an alleged mechanic's lien against the building for the value of said material. The court below sustained a demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action.

We are of the opinion that the demurrer was properly sustained. That a mechanic's lien cannot be acquired against such a public building is fully settled by the case of Jordan v. Board, 39 Minn. 298, 39 N. W. 801. While the title to the property is in the board of courthouse and city hall commissioners, this board is a mere trustee,

[1] Reported in 69 N. W. 1091.

having no proprietary interest in the property, all of the equitable or beneficial interest being in the county of Hennepin and city of Minneapolis.

2. Appellant contends that we cannot take judicial notice of these facts, and that, for all that appears in the complaint, this property may be the private property of the board. The complaint alleges:

"That the said defendant, the board of courthouse and city hall commissioners, is a corporation existing by virtue of an act of the legislature of the state of Minnesota approved March 2, 1887,[2] and entitled 'An act to designate a site for a public building in the city of Minneapolis, to be used as a courthouse for Hennepin county and a city hall for said city, and to create a board of commissioners to purchase or condemn said site and to construct a suitable building thereon, and to authorize said board to issue and sell bonds to pay for said site and said building.'"

It further alleges that this board is the owner in fee simple of lots 1 to 10 in block 77 in the town (now city) of Minneapolis, and were erecting thereon a building "known as the 'New Courthouse and City Hall.'" The courts must take judicial notice of the above-entitled act, even if it had not been pleaded by its title. This very block 77 is the land designated in the act which the board should take for a courthouse and city hall building; and, besides, the building by the board of some private or other different building would be ultra vires its powers as a board.

3. Section 12 of article 1 of the constitution, as amended in 1888, provides:

"* * * A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same: and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed."

Appellant contends that the last proviso gives it a right to proceed against public property as well as private property for the satisfaction of its claim. Whether this last proviso covers public property

[2] Sp. Laws 1887, c. 395.

such as this, it is not necessary to consider. It is clear that it gives a right of seizure and sale only for "a debt incurred by any laborer or servant for labor and services performed." Appellant's claim is not for labor and services performed by a laborer or servant, but for materials sold and delivered.

Order affirmed.

WISCONSIN RED PRESSED BRICK COMPANY v. DAVID HOOD and Others.[1]

February 1, 1897.

Nos. 10,357—(248).

Finding as to Value.

Held, the finding of the court on the question of value is sustained by the evidence.

Sale of Brick—Res Judicata.

The decision on a former appeal (54 Minn. 543), that plaintiff agreed to sell and deliver a well-known grade of brick, and not brick suitable for a particular purpose, and is not liable on an implied warranty that the brick are suitable for such purpose, adhered to.

Mechanic's Lien—Subcontractor.

In order that the subcontractor may acquire a mechanic's lien, it is not necessary that his contract and his performance of the same should conform in all respects to the contract between the contractor and the owner; and in a case where brick furnished as aforesaid by the subcontractor, and used in the building, were inferior in quality to those called for by either contract, it is *held* that the owner had no defense against the lien except such as could have been interposed by the contractor against the claim for personal judgment against him.

Latent Defect—Contract Price.

There was a latent defect in the brick, caused by the use of unfit clay in their manufacture, and not discoverable by the exercise of care and skill in inspecting the brick after they were manufactured. The contractor, in good faith, and without knowledge of the defect, purchased the brick, and used them in the erection of the building, which, after being completed,

[1] Reported in 69 N. W. 1091.

was accepted by the owner. By exposure to the weather, the defect in the brick subsequently developed, and was discovered. *Held*, the contractor, being without fault, is entitled to recover the contract price.

Action in the district court for St. Louis county against David Hood, Hurd Refrigerator Company and New Duluth Land Company. From a judgment in favor of plaintiff and from an order, Ensign, J., denying a motion to set aside the judgment, defendant Refrigerator Company appealed. Affirmed.

White & McKeon, for appellant.

Shaw, Cray, Lancaster & Parker, for plaintiff respondent.

Wm. B. Phelps, for respondent Hood.

CANTY, J. This is the third appeal in this action. See 54 Minn. 543, 56 N. W. 165; 60 Minn. 401, 62 N. W. 550. After the second appeal, the case was again tried before the court, without a jury. The court found that about 80,000 of the brick sold by plaintiff to the contractor Hood—

"Contained a latent or hidden defect, known to plaintiff, which caused them to disintegrate and crumble upon their exposed surfaces, and such defect was not visible or known to the defendants when using said bricks in said buildings, nor when they accepted the same, nor could such defect have been discovered by the use of ordinary means, but could only be determined and developed by exposure in the walls. That, to the extent of 80,000 bricks, said lot of bricks so sold and delivered were not common bricks of good quality, and that the value of said entire lot was and is the sum of $3.50 per thousand, and not $5.50, which difference in value was caused by the hidden or latent defect aforesaid."

On this finding, the court ordered judgment in favor of plaintiff, and against Hood, for the balance due at such rate of $3.50 per thousand, to wit, $258.50, and declared the same a lien on the land of the Hurd Refrigerator Company, and the buildings erected thereon. On certain stipulations made on the trial, the court found that there is due Hood the further sum of $3,416.17, with interest thereon since October 5, 1891, for which a lien was declared on said premises. From the judgment entered thereon, and also from an order refusing to set aside the judgment, the refrigerator company appealed.

1. The bill of exceptions states that it contains all the evidence offered and received having any bearing on the value of the brick.

Appellant contends that the evidence will not sustain a finding that, at the time of delivery, the value of the brick was as much as $3.50 per thousand. We cannot so hold. One of plaintiff's witnesses testified that the brick so delivered was of the value of $6 per thousand.

2. The bill of exceptions further states:

"Charles Hurd, a witness sworn on the part of the defense, testified that the difference in value of the factory building from what it would have been if built of common brick of good quality, or of the best quality of red, kiln-run, well-burned Menominee brick, was $2,500 less than it would have been if so built, and, in like manner, the difference in value of the engine house was $3,000 less than it would have been if built of such brick; and there was no testimony in contradiction of this."

Appellant contends that, on this state of the evidence, plaintiff is not entitled to recover anything, because the damage to appellant's building by reason of the defective character of the brick is greater that either the value or contract price of the brick. This question was disposed of on the first appeal in this case, where the court held that there was no evidence—

"Which would justify the claim of counsel that there was an implied warranty that the bricks to be furnished by plaintiff should be suitable for the use intended by Hood." [2]

Plaintiff agreed to sell and deliver Hood bricks "to be of the grade known as common bricks, * * * to be of good quality and equal to the sample sent." On the last trial the court found:

"That no sample or samples of the grade known as 'common' were ever, in fact, agreed upon or delivered to Hood, as mentioned in said contract, and the brick actually delivered were accepted by defendants without any reference to any sample or samples."

On said first appeal, we held that this contract called for an article of a well-known kind or description; and that there was no implied warranty that it was fit for the purpose for which the purchaser intended to use it. That decision is now the law of this case. Hood, having accepted and retained the brick, is liable for the reasonable value of the same.

3. But appellant claims that, even if plaintiff is entitled to judgment against Hood, it is not entitled to a lien on defendant's prop-

[2] 54 Minn., at page 548, 56 N. W., at page 167.

erty. We cannot so hold. In order that the subcontractor may maintain a mechanic's lien, it is not necessary that his contract and his performance of the same conform in all respects to the contracts between the contractor and owner. While better brick were needed for the outside course of the walls, the bricks furnished were reasonably adapted for the rest of the walls. Under the circumstances, appellant has no defense except such as could have been interposed by Hood himself.

4. It was stipulated on the trial:

"It is admitted between the defendants that the amount due the defendant Hood from the Hurd Refrigerator Company, if there had been a fulfillment of the contract between the defendants, so that there would be no deduction on account of the bad quality of the brick and the damage arising therefrom, would be $3,695.67, with interest from the 5th day of October, 1891; and, had the brick furnished by the plaintiff to the defendant Hood been according to the contract between the plaintiff and the defendant Hood, this would be the amount due, and a lien on the property described in the complaint."

It was further stipulated between the defendants that a full performance by plaintiff of the contract with Hood would have made a full performance of Hood's contract with the refrigerator company, and that—

"Whatever default in the last-mentioned contract said Hood was guilty of was due to, and caused by, the default of the plaintiff in the performance of the first-mentioned contract in furnishing brick."

As we construe these stipulations, they mean that, if both contracts were fully performed, there would be due Hood $3,695.67, after deducting the full amount due plaintiff, at the rate of $5.50 per thousand for all the brick furnished by it, as, under the statute (G. S. 1894, § 6238), the contractor is entitled to a lien only for the balance due him, after deducting the amount due the subcontractor. The court allowed Hood $3,416.17, which was less than was stipulated as due him. But acting on the theory that the amount which would be due plaintiff, if it had fully performed, was not deducted when stipulating the amount due Hood, his attorney entered judgment in his favor for only $3,045.67, and interest thereon since June 29, 1891. If the theory thus acted on is correct, there has not been enough deducted from what was awarded Hood, because, if plaintiff had prop-

erly performed, it was entitled to recover a balance of $920.50, instead of only $258.50, and, in equity at least, its faulty performance should not inure to Hood's benefit, and increase the amount awarded him, but, on the contrary, the whole $950.50 should, in any event, have been deducted from the balance which would be due Hood according to his contract with the refrigerator company.

However, appellant makes no point as to this, but contends that, on the uncontradicted evidence as to the damage to the buildings caused by the latent defect in the brick, Hood is not entitled to recover anything. Hood's contract with appellant required him to furnish "kiln-run" brick, while his contract with plaintiff required it to furnish only "the grade known as common brick," which, as the evidence shows, is a grade inferior to kiln-run brick. Appellant might, at least, have been entitled to recoup against Hood, as damages, the difference between what the buildings would be worth if built of kiln-run brick, and what they would be worth if built of the grade known as "common brick." But there was no evidence introduced to prove the amount of this difference, and besides, by the stipulation above referred to, the defendants contradicted and nullified the effect of the evidence showing that there was such a difference, and that Hood had deliberately proceeded to violate his contract with the refrigerator company, by contracting with plaintiff for common brick, instead of kiln-run brick.

But appellant contends that Hood is responsible to it for the latent defect in the brick, and that it is entitled to recoup against him the amount of damage to the buildings caused by such defect. We cannot agree with appellant. Undoubtedly, if Hood had manufactured the brick himself, he would then, so to speak, be manufacturer of both the brick and the buildings, and would be liable for the damage to the buildings caused by such latent defect in the brick. But Hood did not manufacture the brick, had no knowledge of the defect in them, acted in good faith, and exercised reasonable care and skill. No amount of care and skill would have discovered the defect, and his contract was completed, and the building accepted by the refrigerator company, before the defect was discovered. Even though an article is furnished for a particular use, if the vendor is not the grower or manufacturer, there is, as a general rule, no implied warranty against latent defects. The vendor of provisions for

immediate consumption is generally held to be an exception to this rule, and it has sometimes been made a question whether the vendor of seed is not also such an exception. Caveat emptor is the general rule.

In Bluett v. Osborne, 1 Starkie, 384, Lord Ellenborough held the plaintiff entitled to recover for a bowsprit furnished by him for a vessel, although the bowsprit turned out to be defective. It was apparently good when furnished. It does not appear that plaintiff was the manufacturer. In Gray v. Cox, 4 Barn. & C. 108, the plaintiff furnished copper sheathing for a vessel. The copper contained a latent defect, and, while the case went off on another point, stress was laid on the fact that plaintiffs were not the manufacturers of the copper. Jones v. Bright, 5 Bing. 533, is a case quite similar in all respects, except that the seller of the copper was himself the manufacturer, and the court held him liable on an implied warranty against the latent defect. Some of the judges used language which would imply that any seller, whether manufacturer or not, is liable on such an implied warranty, but no cases were cited to sustain such dicta. In Brown v. Edgington, 2 Man. & G. 279, the seller represented himself to be the manufacturer when he contracted to furnish the article. In Shepherd v. Pybus, 3 Man. & G. 868, 881, it is said:

"The subject of the purchase was a barge built by the seller himself; and the purchaser had had no opportunity of inspecting it in its progress, and the defects which were afterwards discovered were not apparent upon inspection, and could only be detected upon trial."

For these reasons, it was held that there was an implied warranty that the barge was fit for ordinary use. In Jones v. Just, L. R. 3 Q. B. 197, the court laid down five propositions, covering different types of cases, and, in the fourth, the dealer, as well as the manufacturer, is said to be liable on such an implied warranty in a sale made by him; but the cases cited in support of this are the ones last above cited, which do not sustain the proposition that the mere dealer is liable on such an implied warranty. The case then before the court did not call for any decision on this point, as it was merely a case of a sale of goods to arrive in port, and, when they arrived, they were found not to be merchantable. In Hoe v. Sanborn, 21 N. Y. 552, the cases were reviewed at length by Seldon, J.; and it is

held that, even where a manufacturer furnishes an article for a specific purpose, an implied warranty against latent defects can only be held to exist on the ground that it is presumed that he or his servants, for whom he is responsible, knew of the defect. In White v. Miller, 71 N. Y. 118, 131, it is said:

"It was decided in Hoe v. Sanborn that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor, and there seems to be the same reason for implying a warranty on a sale of seeds by the grower."

In Randall v. Newson, L. R. 2 Q. B. Div. 102, the court held the manufacturer to be an absolute insurer against all latent defects, and liable for all damages caused by such defects; and this seems to be the holding of the court in Rodgers v. Niles, 11 Ohio St. 48.

We are of the opinion that such an extraordinary responsibility is not, by the principles of the law, imposed on the manufacturer. The correct rule was applied in Bragg v. Morrill, 49 Vt. 45, and Archdale v. Moore, 19 Ill. 565 (approved in Kohl v. Lindley, 39 Ill. 195), where it is held that the manufacturer is only liable for failing to exercise the proper degree of care and skill in the selection of material, and in the manufacture of the same, and that he impliedly warrants that he has done this.

This disposes of the case, and the order and judgment appealed from are affirmed.

FREDERICK J. WILL v. SISTERS OF THE ORDER OF ST. BENEDICT.[1]

February 1, 1897.

Nos. 10,365—(249).

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Religious Order—Will of Member—Witnesses.

The will of a member of an incorporated religious order, devising and bequeathing all her property to the corporation, was witnessed by two other members of the order. G. S. 1894, § 4428, declares void all devises and legacies to subscribing witnesses. The corporation was organized for char-

[1] Reported in 69 N. W. 1090.

itable purposes, not for pecuniary gain to its members. Each member was, by its by-laws, required to give all her present and future property to the corporation, as well as her services, without compensation. *Held*, the witnesses did not have any such present, certain, and vested pecuniary interest in the property devised by the will as to make them incompetent.

Same—Undue Influence.

Held, on the evidence, the trial court was justified in finding that the will was not executed under undue influence and duress.

Evidence of Fact.

Held, it was not error to permit the proponent of the will to deny the existence of a certain fact recited by way of inducement in the will.

Appeal by Frederick J. Will from an order of the district court for Stearns county, Searle, J., denying a motion for a new trial. Affirmed.

Horton & Denegre, for appellant.

The recital at the beginning of the will proves the incompetency of testatrix. She makes her will because a law of the order commands it. To this order she is bound by a solemn vow. She does not state that she is of sound and disposing mind and memory, etc. No individual can be a member of this order and at the same time be a free moral agent. The will whereby she transferred her property was dictated by the order. That there was to be no mistake the entire will was printed. The will speaks for itself. There are no blanks to fill. There are no interlineations. When the will is in the handwriting of the party benefited it is to be regarded with great suspicion. Raworth v. Marriott, 1 Myl. & K. 643; Schouler, Wills, § 238; Harrel v. Harrel, 1 Duval, 203; Cramer v. Crumbaugh, 3 Md. 491. The law presumes undue influence when a person makes a will in favor of her religious adviser to the exclusion of the natural objects of testatrix's bounty. Marx v. McGlynn, 88 N. Y. 357. See Calhoun v. Jones, 2 Redf. Sur. 34; Children's Aid Soc. v. Loveridge, 70 N. Y. 387; Marsh v. Tyrrell, 2 Hagg. Eccl. 84; In re Welsh, 1 Red. Sur. 238; Casborne v. Barsham, 2 Beav. 76; Richmond Appeal, 59 Conn. 226, 22 Atl. 82; Schouler, Dom. Rel. § 512; Muller v. St. Louis H. Assn., 5 Mo. App. 390; Tyler v. Gardiner, 35 N. Y. 559. A will made under the circumstances surrounding this case must be examined with peculiar care, and every presumption explained away. The proponent attempts to prove the execu-

tion of the will, and introduces evidence to contradict the instrument referred to in it.

Theo. Bruener, for respondent.

The interest to disqualify a witness to the will must be present, certain and vested. Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437; In re Holt's Will, 56 Minn. 33, 57 N. W. 219. There can be no fatal undue influence without a person incapable of protecting himself, as well as a wrong-doer to be resisted. Latham v. Udell, 38 Mich. 238. The testimony shows the testatrix was in fair health and good mental condition. There is no testimony that testatrix was incapable of protecting herself. A testatrix may be affected by her prejudices and predilections arising from association, but if she has sufficient testamentary capacity she may dispose of her property by will as she pleases, if it be her own voluntary act. Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885; In re Hess' Will, 48 Minn. 504, 51 N. W. 614. See Lynch v. Clements, 24 N. J. Eq. 431; Turner v. Cheesman, 15 N. J. Eq. 243; Boylan v. Meeker, 4 Dutch. 274; Den v. Gibbons, 2 Zabrisk. 117. See Const. art. 1, § 16.

CANTY, J. The deceased, M. Julia Will, died in August, 1894. For 14 years prior to her death she had been a member of the Sisters of the Order of St. Benedict, a religious order incorporated under the laws of this state. In October, 1893, she made a will devising her property to this corporation. Her brother and only heir appeared in the probate court, and opposed the application to probate the will. His objections were overruled, and the will allowed. He appealed to the district court, where the contest was tried by the court without a jury, and the will was again allowed. From an order denying his motion for a new trial, he appeals to this court.

1. The subscribing witnesses to the will were two other members of the corporation, and appellant contends that they were incompetent as witnesses because interested. G. S. 1894, § 4428, declares void all beneficial devises and legacies to subscribing witnesses, and appellant contends that the legacy is to these two witnesses, they being members of the corporation. The interest that will disqualify such a witness must be present, certain, and vested. Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437; In re Holt's Will, 56 Minn.

33, 57 N. W. 219. This was a corporation for charitable purposes, not for pecuniary profit to its members. The business of the corporation, as stated in its articles of incorporation, is "to establish and conduct colleges, seminaries, schools and educational institutions for literary and social culture." The by-laws of the corporation provide that the members shall give all their present and future property to the corporation, as well as their services, without compensation. Then the witnesses could not have any present, certain, or vested pecuniary interest in property devised by this will to the corporation, and were competent witnesses. The case is similar to Quinn v. Shields, supra.

2. It appears from another portion of the by-laws that the testatrix was required to make a profession or vow that she would devise and bequeath to the corporation all her property. The will recites that she took this vow, and was, by her will, proceeding to fulfill it. On these facts appellant contends that it conclusively appears she was not thereafter a free, moral agent; that she executed the will by reason of undue influence and duress, and that the court below erred in finding to the contrary. Whether the evidence would sustain a finding in appellant's favor we need not decide. We are clearly of the opinion that the evidence did not require such a finding. The testatrix was a free, moral agent when she took the vows in question. It nowhere appears that she afterwards repented the step, and would not have made the will if she had not already taken the vows. She took the vows voluntarily, after three years of probation, and, for all that appears, she would take them again if she were absolved from them. There is nothing to show but that she took these vows and made this will purely through religious or sectarian zeal.

3. Appellant assigns as error the receiving of oral evidence tending to prove that the member was not, as recited in the will, required to make a profession or vow to leave her property to the order. This evidence did not, as contended by appellant, contradict the express terms of the will. It merely denied the existence of a certain fact recited in the will by way of inducement, and its admission was not error.

4. There is nothing in the point that it appears from the evidence that the deceased left no property. On the contrary, it appeared that

she left an undivided one-half interest in certain real estate, left her by her mother. Its value was, on this contest, immaterial.

No other point is made worthy of consideration, and the order appealed from is affirmed.

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LAFAYETTE G. M. FLETCHER v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.[1]

February 1, 1897.

Nos. 10,385—(261).

Eminent Domain—Petition—Amendment.

The petitioner in condemnation proceedings may legally amend his petition, with leave of the court, so as to strike therefrom land as to which he does not wish to continue the proceedings, the owner of such land not objecting.

Railway—City Ordinance—Evidence.

The respondent, having decided to change the line of its railway through the city of Mankato, instituted proceedings in this matter to condemn the right of way for its new line, and on the hearing of its petition it offered in evidence an ordinance of the city authorizing such change, which was objected to on the ground that its provisions as to rights in the streets which it purported to grant to the respondent were invalid. No rights of the respondent in any of the streets were involved in such hearing. *Held*, that the ordinance was rightly received in evidence.

Same—Cost.

On such hearing the material and competent evidence was such as to require a finding that public interests required and would be promoted by the construction and operation of the proposed new line. *Held*, that it was not reversible error to receive other evidence tending to show the amount already expended by respondent on the line.

Alteration of Route.

Held, that the evidence was sufficient to sustain the finding of the trial court to the effect that the board of directors of the respondent duly determined, by a two-thirds vote of the whole number thereof, to alter the line of its railway as proposed in its petition.

[1] Reported in 69 N. W. 1085.

Petition—Allegations.

It is not necessary, in a petition to condemn land for railway purposes, to specify the particular public use to which each tract of land is to be put. A general allegation of the purposes for which it is sought to acquire the land described in the petition is sufficient, for the landowner's damages are to be assessed upon the hypothesis that the land to be acquired is liable to be appropriated for any or all of the public uses stated in the petition at any time when the railway company deems such use necessary or expedient.

G. S. 1894, § 2750.

G. S. 1894, § 2750, which authorizes any railroad corporation to alter its railway line whenever it shall appear to its board of directors that the line can be improved thereby, and expressly confers upon such corporation "the same rights and privileges to build such road as altered, as if it were the original line," construed, and *held*, that it authorizes such corporation to condemn land for such new line, and that the respondent herein has such right.

Appealable Order.

An order denying a motion to set aside the report of the commissioners in condemnation proceedings is not appealable. Whether an order appointing them is,—quære.

Appeals by Lafayette G. M. Fletcher from orders of the district court for Blue Earth county, Severance, J., the one appointing commissioners in condemnation proceedings, and the other denying a motion to set aside the report of the commissioners. Order appointing commissioners confirmed. Appeal from the order denying the motion to set aside the report dismissed.

Fletcher & Taylor and *John A. Larimore*, for appellant.

The city ordinance was an attempt on the part of the council to delegate to the company a legislative function, and hence is void. Oakland v. Carpentier, 13 Cal. 540; Thompson v. Schermerhorn, 6 N. Y. 92; East St. Louis v. Wehrung, 50 Ill. 28; Kinmundy v. Mahan, 72 Ill. 462; Ruggles v. Collier, 43 Mo. 353; Thompson v. Boonville, 61 Mo. 282; Darling v. St. Paul, 19 Minn. 336 (389); Minneapolis G. L. Co. v. City of Minneapolis, 36 Minn. 159, 30 N. W. 450; Cooley, Const. Lim. 204 et seq.; Dillon, Mun. Corp. (4th Ed.) § 96. This ordinance, if held valid, would deprive abutting owners of the use of their property without compensation.

It was incumbent upon petitioner to show the proceedings at the meeting of the board of directors of petitioner were regular. Derby v. Framingham & L. R. Co., 119 Mass. 516; Prather v. Jefferson M. & I. R. Co., 52 Ind. 16, 37; Bensley v. Mountain L. W. Co., 13 Cal. 306, 316; Matter of Poughkeepsie Br. Co., 108 N. Y. 483, 15 N. E. 601; Hull v. Chicago, B. & Q. Ry. Co., 21 Neb. 371, 32 N. W. 162. The petition should show the purposes for which the property is to be taken and the uses to which it is to be put. Valley R. Co. v. Bohm, 34 Oh. St. 114; Bay City B. L. R. Co. v. Hitchcock, 90 Mich. 533, 543, 51 N. W. 808; Matter of N. Y. Central & H. R. R. Co., 5 Hun, 86; Bottoms v. Brewer, 54 Ala. 288; Rensellaer & S. R. Co. v. Davis, 43 N. Y. 137; Lance's Appeal, 55 Pa. St. 16.

For the purpose of improving this property the railroad cannot now exercise the power of eminent domain. Brigham v. Agricultural B. R. Co., 1 Allen, 316; Moorhead v. Little M. R. Co., 17 Oh. 340; Mason v. Brooklyn C. & N. R. Co., 35 Barb. 373, 381; Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 205; Little M. R. Co. v. Naylor, 2 Oh. St. 236, 239; Hudson & D. C. Co. v. New York & E. R. Co., 9 Paige Ch. 322; Matter of Poughkeepsie Br. Co., 108 N. Y. 483, 491, 15 N. E. 601; Blakemore v. The Glamorganshire Canal Nav., 1 Mylne & K. 154, 165; Derby v. Framingham & L. R. Co., 119 Mass. 516; 1 Redfield, Railways, 391; Mills, Em. Dom. 58.

Thomas Wilson, *L. K. Luse* and *Lorin Cray*, for respondent.

The evidence shows the meeting of the directors was regularly called. But in the absence of such evidence that would be presumed. 1 Morawetz, Corp. (2d Ed.) § 532; 1 Thompson, Corp. § 789; 3 Thompson, Corp. §§ 3926, 3927, 3934; 5 Thompson, Corp. § 6479; Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671; Sargent v. Webster, 13 Metc. (Mass.) 497; Heintzelman v. Druids, 38 Minn. 138, 36 N. W. 100. No railroad company could foresee in advance where it might be necessary in the future to put in a sidetrack, or erect an elevator or water tank, or extend the limits of its yard, nor could the landowner be prejudiced by an omission to particularize in the petition, for he is entitled to damages for the taking for any and all legitimate purposes of the railroad. Wilkin v. First Div. St. P. & P. R. Co., 16 Minn. 244 (271). There is nothing in the opinion that petitioner has no legal right to condemn land for the use of its new line. G. S. 1894, §§ 2645, 2646, 2750; State

v. St. P., M. & M. R. Co., 35 Minn. 131, 28 N. W. 3; People v. Dutchess & C. R. Co., 58 N. Y. 152, 165, 166; Sp. Laws 1879, c. 183, § 2; Sp. Laws 1881, c. 372.

START, C. J.[2] The respondent instituted proceedings in the district court of the county of Blue Earth to condemn certain lands to enable it to change the line of its railway through the city of Mankato. On its petition, commissioners to assess the damages of the owners of such lands were, by the order of the court, appointed. The appellant, one of the landowners, appealed from the order, giving a supersedeas bond, but the respondent gave a counter bond under the provisions of G. S. 1894, § 2613, and the commissioners proceeded with their work, assessed the damages, and made their report to the court. Thereupon the appellant made a motion to set aside the report. It was denied, and he appealed from the order denying his motion. The appeals will be considered in the order in which they were taken.

1. The respondent was permitted by the trial court, against the objection and exception of appellant, to strike from its petition a certain lot described therein. This ruling is assigned as error. The appellant had no interest in the lot omitted from the petition, and such amendment of the petition did not in any manner change the proposed line of respondent's railway, or affect any interest of appellant in the slightest degree. While it is true, as claimed, that the filing of a proper petition and the giving of due notice as required by the statute[3] are jurisdictional, and that amendments to supply omissions in the petition which go to the jurisdiction of the court ought not to be allowed, still any formal amendments, such as striking from the petition land as to which the petitioner does not wish to continue the condemnation proceedings, ought to be allowed, especially so when, as in this case, the owner of the land does not object, and none of the other landowners can be prejudiced thereby. The ruling complained of was right.

2. The respondent gave evidence against the objection and exception of appellant, to the effect that it had expended on its proposed new line some $100,000, and that, if it was delayed in the work of completing it until cold weather, the cost of the work would be

[2] Buck, J., took no part.

[3] G. S. 1894, § 2606.

materially increased. It is true that this evidence was not material upon the question whether public interest required and would be promoted by the prosecution of the enterprise, but it is apparent from the record that the evidence was offered for the purpose of showing that, if the respondent was entitled to prosecute the enterprise, it should be permitted to do so without unnecessary delay. In any view of the case, it was not reversible error to receive the evidence, for the material and competent evidence in the case was such as to require a finding that public interest required and would be promoted by the prosecution of the enterprise.

3. The respondent introduced in evidence an ordinance of the city of Mankato authorizing the respondent to change its line of railway through the city, and relocate and operate it along the line indicated by the map referred to in the ordinance, being the same line described in the petition. The receiving of this ordinance in evidence is urged as error on the ground that the ordinance attempts to confer upon the respondent unauthorized rights in and over the streets of the city; that the streets which it is authorized to use are not designated, but are to be selected by respondent; and that the ordinance delegates to it legislative functions, and that the effect of the ordinance is to deprive the owners of land abutting upon the streets of their property without compensation. None of the property of the appellant is affected by the ordinance, and no question as to the right of the respondent to use any of the streets of the city by virtue of the ordinance is involved in this appeal; hence it is unnecessary to inquire whether it is invalid in the respects claimed. It was offered in evidence to show that the city had consented to and authorized the change of line as required by G. S. 1894, § 2750. For this purpose it was properly received.

4. The next alleged error is that the evidence offered by the respondent to establish the fact that its board of directors, by a two-thirds vote of the whole number thereof, determined to alter the line of its railway, was incompetent, and insufficient to prove such fact.

The evidence, both oral and documentary, was competent, and was sufficient to sustain the finding of the trial court to the effect that all the allegations of the petition are true, which necessarily includes a finding that the respondent's board of directors did, by a two-thirds vote, adopt a resolution altering its line as set forth in

the petition, and that such resolution was recorded as required by the statute. There is evidence other than the records of the respondent to show that the meeting at which the resolution was adopted was duly called, but the record of the proceedings of the board of directors received in evidence show that a quorum was present. This is prima facie evidence that all were notified. Heintzelman v. Druids R. Assn., 38 Minn. 138, 36 N. W. 100, 1 Morawetz, Priv. Corp. § 532. Upon the question whether the resolution was carried by a two-thirds vote, in addition to the record, which states that the resolution was carried (a resolution to change the line could only be carried by a two-thirds vote), there was the evidence of one of the directors, who was present at the meeting of the board, to the effect that all of the directors present, nine in number,—an admitted two-thirds,—to his positive knowledge voted for the resolution, except that he did not hear the director in the chair vote for the resolution, but that he declared the resolution carried, and certified to the map showing the change. This record and the oral evidence establishes prima facie that the resolution was adopted by a two-thirds vote. Heintzelman v. Druids R. Assn., supra.

5. Another alleged error is that the order appointing the commissioners provided for the acquiring by respondent of an absolute title in fee to the land taken. It is not clear that the order is susceptible of such a construction, but we need not decide the question, for, no matter what the language of the order may be, the respondent cannot acquire thereby any greater title to or easement in the land of the appellant than the law permits it to acquire by condemnation proceedings. Scott v. St. Paul & C. R. Co., 21 Minn. 322; Gurney v. Minneapolis U. E. Co., 63 Minn. 70, 65 N. W. 136.

6. The land of the appellant sought to be acquired by the condemnation proceedings is a strip 300 feet in width. The appellant claims that there is no necessity shown by the petition or the evidence for taking so wide a strip for the purpose of operating the proposed line of railway over his land; that it is necessary for the petition to state the particular use to which land of each owner is to be appropriated; and that, in the absence of any allegation in the petition that the particular tract here in question was to be used for depots, warehouses, side tracks, and other general railway purposes, the petitioner cannot use the land taken under its petition for any other purpose "than

as a right of way on which to lay one single main track and telegraph line"; hence there can be no necessity for taking so wide a strip of his land. The petition alleges that it is necessary, for the purposes of changing, constructing, and operating this line of railway, to take all of the land therein described to the full width indicated on the map filed with the petition, not simply for a right of way, but for all of the purposes for which it is necessary for a railway company to acquire land in order to build and operate its line. The petition alleges in detail such purposes, including necessary buildings, structures, yards, etc. All of these allegations apply to the appellant's land, and the respondent seeks to take the whole 300 feet in width for all of these purposes, and alleges that it is necessary so to do in order to change and operate its line. The trial court found these allegations true, and also that public interest required the prosecution of the work. Such finding is a conclusive answer to the claim of the appellant.

It is not necessary to specify in the petition the particular public use to which each tract of land is to be put. A general allegation of the purposes for which it is sought to acquire the land described in the petition is sufficient. It would be impossible for a railway company to foresee and specify the particular use, and the extent thereof, to which it might be necessary in the future to put each parcel of land to be taken for railway purposes. The rule we have stated cannot prejudice the landowners, for by the petition they are advised that the land to be taken is liable to be appropriated for any or all of the public uses stated in the petition, and their damages are to be assessed upon the hypothesis that it may be so used at any time if the railway company deems such use necessary or expedient. Wilkin v. First Division, 16 Minn. 244 (271).

7. Lastly, the appellant claims that the petitioner in this case has no legal right to condemn land for the purpose of changing its line of railway. We agree with counsel for appellant that statutes authorizing the exercise of the power of eminent domain are to be strictly construed, and that the power exists only when expressed in the statute in definite language, which cannot reasonably be construed to mean anything else. But we do not agree with counsel in his claim that any alteration in the line of a railway which benefits the railway company does not necessarily benefit the public. The

reverse of the proposition is true, for any change in the line whereby the company is enabled to maintain the line at less expense, or operate it with greater safety and convenience and more economically, is necessarily a benefit to the public, and promotes its interest.

The statutes under which the respondent claims the right to condemn land for the purpose of changing its line must be construed in the light of this proposition. So construing them, it is clear that the right is conferred in definite language, which cannot reasonably mean anything else. G. S. 1894, § 2645, provides that any railroad company now existing or hereafter organized which has authority under the laws of the state to build and operate a railroad in this state shall have power to acquire by condemnation all land necessary for the full enjoyment and operation of its road. The respondent has all of the powers conferred by this statute. Sp. Laws 1879, c. 183; Sp. Laws 1881, cc. 219, 228. The respondent had the undoubted right to condemn land for its original line. Now, G. S. 1894, § 2750, authorizes any railroad corporation to alter its line whenever it shall appear to its board of directors that the line can be improved thereby, and they so determine by a vote of two-thirds of the whole number, and complying with the other provisions of this statute: "Thereupon it shall have the same rights and privileges to build such road, as altered, as if it were the original line." In order to build its original line, the respondent had the right to acquire the land to build it on either by purchase or condemnation; and as to the altered line it has all, not a part, of the rights it had as to the original. It therefore has the right to acquire the necessary land for its altered line by condemnation.

8. We have disposed of the appeal from the order appointing commissioners upon the merits, although the respondent insists that the order is not appealable. We have done so because this court held such an order appealable in the case of In re St. Paul & N. P. Ry. Co., 34 Minn. 227, 25 N. W. 345, and it may be presumed that the appeal was taken in reliance on this prior decision. But because we have so disposed of this appeal we are not to be understood as holding that the order is appealable. Upon the question whether the decision which we have referred to shall be followed or overruled, we express no opinion.

9. The second appeal herein is from an order denying the appellant's motion to set aside the report of the commissioners. The order is not appealable. It is neither an order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken, nor a final order affecting a substantial right in a special proceeding. Turner v. Holleran, 11 Minn. 168 (253); Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419, 23 N. W. 854.

In the last case cited it was said that an order denying a motion to set aside the award of the commissioners was not appealable. That such an order does not determine the proceeding, and prevent a judgment, is obvious. That it is not a final order affecting a substantial right is also clear, for the statute provides for the entry of a judgment on the assessment or award of damages by the commissioners, or on the verdict of a jury in case of an appeal to the district court; and the order may be reviewed as an intermediate one on appeal from such judgment. This is apparent from the character of the judgment to be entered in condemnation proceedings pursuant to G. S. 1894, § 2615. Such judgment is one adjudging and declaring the right of the petitioner to take, use, and appropriate the land in controversy upon paying the damages awarded, and also one in favor of the landowner for the amount of the compensation awarded for such taking. Curtis v. St. Paul & S. R. Co., 21 Minn. 497; Robbins v. Same, 24 Minn. 191. The order appointing the commissioners is affirmed, and the appeal from the order denying the motion to set aside their report is dismissed. So ordered.

WILLIAM DEERING & CO. v. EDWARD SHUMPIK.[1]

February 1, 1897.

Nos. 10,410—(262).

Verdict Sustained.

Held, the verdict is sustained by the evidence.

Evidence.

Evidence *held* sufficient to prove that an alleged agent was either duly authorized, or that his acts were subsequently ratified by his principal.

Same—Telephone.

Evidence of the identity of a person conversing through a telephone *held* sufficient.

Appeal by plaintiff from an order of the district court for Hennepin county, Pond, J., denying a motion for a new trial. Affirmed.

Marshall A. Spooner and *Spooner & Laybourn*, for appellant.

Appellant contends that the conversation by telephone should not have been admitted in evidence: (1) Because there was no identification of the party sufficient to justify the contention that it was Mr. McKee who telephoned, the latter having testified that he never had any conversation with defendant over the telephone. Oberman B. Co. v. Adams, 35 Ill. App. 540. (2) The conversation was immaterial in view of the fact that defendant afterward had the bond in his own hands, and could easily have ascertained whether Dr. Downey had signed the instrument. He should not have been permitted to avoid his liability upon a sealed instrument by testifying to facts which practically vary the terms of the instrument. The conduct of defendant in omitting to see whether Dr. Downey had signed the bond was wholly inconsistent with his claim that defendant was anxious to know whether Dr. Downey had signed before him. A party attacking an instrument on the ground that his signature was obtained by fraud must establish his case by clear, satisfactory and convincing proof, Smith v. Jordan, 13 Minn. 246 (264); Guernsey v. American Ins. Co., 17 Minn. 83 (104); Layman v. Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113; Crookston Imp. Co. v. Marshall, 57 Minn. 333, 59 N. W. 294; and must show he himself was reasonably free from negligence,

[1] Reported in 69 N. W. 1068.

McCall v. Bushnell, 41 Minn. 37, 42 N. W. 545; Minneapolis, St. P. & S. S. M. Ry. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63; Parlin v. Small, 68 Me. 289.

Brooks & Hendrix, for respondent.

When one of the parties to a contract is induced to execute it by the intentional fraud of the other, the defrauded party may defend against its enforcement even if he is lacking in ordinary business prudence in executing it. Aultman & Co. v. Olson, 34 Minn. 450, 26 N. W. 451; Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638.

CANTY, J. One Vaughn was in the employ of plaintiff as collector, and he, as principal, and the defendant, as surety, signed a bond payable to plaintiff, conditioned that Vaughn would account for, pay over, and deliver to plaintiff all moneys and securities belonging to it, coming into his hands. Vaughn collected $695 of the plaintiff's money, which he failed to pay over or account for, and this action is brought to recover the same on the bond. The defense is that the bond was signed by defendant under an agreement with plaintiff that it should not take effect or be considered as executed or delivered until one Downey also signed and executed it as a surety, which Downey never did. Defendant had a verdict, and from an order denying its motion for a new trial plaintiff appeals.

1. Appellant's contention that the verdict is not sustained by the evidence is not well founded. There is evidence tending to prove that Vaughn had requested defendant to sign this bond; that subsequently the bond prepared for the signatures of the principal and sureties was presented to defendant at his store in Minneapolis by one Barclay, a bookkeeper of plaintiff. As to what then and there occurred, defendant testified:

"I then said to Mr. Barclay, 'How is this that Dr. Downey's name isn't on the bond?' 'Why,' he said, 'I have just come from his office,' he said, 'and he was very busy, and requested that I should come and see you, and have you sign first, and then he would sign.' * * * I said, 'Very well, under those conditions I will sign that bond;' but I said, 'I want it understood that it will not hold me until Dr. Downey and Mr. Vaughn have both signed.' He said that that would be all right; he would go back to the office, and have Dr. Downey sign. * * * I said, 'Now, you understand and I

understand that I am not to be held on this bond until Dr. Downey and Mr. Vaughn have both signed it.' He said, 'Certainly.' I then handed it back, and in the meantime thought about the acknowledgment. I had some experience in the same line before, and I stated, 'How about the acknowledgment?' 'Why,' he said, 'that will be all right.' He says, 'After I get Dr. Downey to sign the bond and Mr. Vaughn, I will telephone you, or we will telephone you, and you can come down to the office, and make your acknowledgment. We have a notary there.' I said, 'Very well,' and that is all the conversation there was."

Defendant further testified that a few days afterwards he was called to the telephone in his store, and, on responding, was told by a voice through the telephone that it was Mr. McKee, of the plaintiff company. The witness testified:

"I said, 'Very well, Deering, what can I do for you?' He said, 'Mr. Vaughn's bond is ready for you to sign.' I then asked if Dr. Downey and Mr. Vaughn had both signed that bond. He said, 'Yes; it is all ready for you.' I said, 'Very well; I will be down in a few minutes.' That was all the conversation." The witness further testified that he went immediately to plaintiff's office, and found a man sitting at a desk. Said the witness: "I asked for Mr. McKee. He said that was his name. I said, 'You telephoned me in regard to Mr. Vaughn's bond being ready for me to sign.' He said, 'Oh, yes,'" and produced the bond.

Thereupon defendant signed an affidavit attached to the bond, and acknowledged the execution of the bond, without seeing his former signature (as the bond was folded so as to conceal the same), and supposed at the time that it had in the meantime been signed by Downey as well as Vaughn. The evidence also shows that Barclay presented the bond to Downey for signature before he presented it to defendant, and that, after defendant signed it, it was again presented to Downey for signature before defendant acknowledged it, as aforesaid; but Downey always refused to sign the bond and never did sign it. We are of the opinion that the foregoing evidence, though contradicted in part by evidence on behalf of plaintiff, is sufficient to sustain the verdict.

2. Plaintiff assigns as error the overruling of its objections to the evidence of the conversation between defendant and Barclay at the time the latter presented the bond to the former for signature, on the ground that it did not appear that Barclay had authority to represent plaintiff in entertaining or agreeing to the conditions on

which defendant claims he then signed the bond, and that, in procuring the signature of defendant, Barclay was acting as the agent, not of plaintiff, but of Vaughn.

Whether Barclay had authority to represent plaintiff in procuring this bond, and, if not, whether McKee (who it is admitted had such authority) was informed by Barclay of the conditions on which defendant signed the bond, were, on the evidence, questions for the jury. The statements of McKee to defendant through the telephone tend to prove that he (McKee) had been so informed. Again, Barclay was in plaintiff's employ, and the evidence tends to prove that he presented the bond to defendant for signature by direction of McKee. To explain this, McKee testified that, when Vaughn was in a hurry to go out on the road, he came to the witness, and, said the witness, "asked me if I had any objection to his arranging with one of the boys to take the bond, and have it signed; that he had seen parties who he thought would sign the bond." The further cross-examination has some tendency to show that, at this time, Vaughn left the blank bond with McKee himself. Mr. McKee further testified:

"Q. Now, Mr. McKee, when did you first hear anything about Dr. Downey signing that bond, if you remember? A. Well, I wouldn't be sure that I remember anything regarding that until Mr. Shumpik came in there to sign and acknowledge the bond. Q. You think that this is the first you ever heard of it? A. Well, it is possible that the man who came in and delivered it to me said that Mr. Vaughn had personally arranged to have Dr. Downey sign it, but Dr. Downey wouldn't sign it. I think that is possible."

3. Plaintiff assigns as error the overruling of its objection to the evidence of the conversation of defendant with some one through the telephone, as aforesaid, for the reason that, as claimed by plaintiff, it does not appear that the person who talked to defendant through the telephone was McKee. McKee denied on the witness stand that he ever had any such conversation through the telephone with defendant. The point is not well taken. The jury had a right to believe defendant's testimony that, immediately after the conversation through the telephone, McKee admitted at his office that he had telephoned defendant in regard to the bond. Defendant also testified: "The voice I heard at the telephone was the same voice I heard right after," when talking to McKee at his office.

These are all the points raised worthy of consideration. Order affirmed.

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STATE OF MINNESOTA ex rel. H. W. CHILDS, Attorney General, v. BOARD OF COMMISSIONERS OF RED LAKE COUNTY and Others.[1]

February 1, 1897.

Nos. 10,473—(303).

Constitution—Title of Act—Laws 1893, c. 143.

Laws 1893, c. 143, entitled "An act to provide for the creation and organization of new counties and government of the same," is not unconstitutional for the alleged reason that its subject is not expressed in its title, as required by article 4, § 27, of the constitution.

Organization of New County—Petition.

An elector may legally sign two or more noncompeting petitions for the creation and organization of new counties under the provisions of this statute.

Same—Submission to Electors—Adoption.

All propositions for the creation of such new counties, whether competing or otherwise, if supported by valid petitions, must be submitted to the electors; but only one of the competing propositions can be adopted at the same election, and to secure this result it must receive a majority of all the votes cast thereon, also a plurality of the votes cast on the propositions with which it is competing.

Information in the nature of quo warranto. Writ discharged.

H. W. Childs, Attorney General, *H. Steenerson*, and *William Watts*, for relator.

Laws 1893, c. 143, is unconstitutional, because the subject is not sufficiently expressed in its title. The title is "An act to provide for the creation and organization of new counties," etc. The act not only provides for the creation and organization of new counties, but for changing the lines of counties already organized. The distinction between established and organized counties is clear and definite, and has been recognized since the foundation of the state. State v. McFadden, 23 Minn. 40. Organizing new counties and carving them out of established counties without municipal organization have always been wholly within legislative control without reference to popular vote. By such act of the legislature every county since the adoption of the constitu-

[1] Reported in 69 N. W. 1083.

tion has come into existence. The title to this act would indicate provisions relative to the organization of new counties out of unorganized or established counties. But its provisions relate exclusively to changing lines of counties already organized, of old counties. See In re Hauck, 70 Mich. 396, 38 N. W. 269; Black, Const. L. 287.

The petition for the organization of Red Lake county is invalid, because it is signed by the same persons who signed other petitions filed at the same time. An elector can sign only one petition under this law. Any other construction of this statute would lead to absurdities more extreme than those in the case at bar. State v. Van Camp, 36 Neb. 91, 54 N. W. 113. The proposition for the establishment of Red Lake county conflicts with those for the establishment of Mills and Columbia counties. They defeat each other. State v. Armstrong, 30 Neb. 493, 46 N. W. 618. There is nothing in the law giving priority to any petition by reason of its being filed first. The authorities having placed conflicting propositions upon the ballots, these propositions defeated themselves by reason of their embracing the same territory. To adopt any proposition the act in question requires a majority of all voters, or at least a majority of all votes cast. Alexander v. Worthington, 5 Md. 485; Sutherland, St. Const. 313.

Davis, Kellogg & Severance and *Ira B. Mills*, for Garfield county.

Laws 1895, c. 124, § 2, should not be construed so as to allow the submission of conflicting propositions at the same election. A construction allowing the submission of several overlapping propositions would lead to an absurd result. 23 Am. & Eng. Enc. Law, 362; Sutherland, St. Const. § 324; Stickney v. Maidstone, 30 Vt. 742; Perry v. Skinner, 2 M. & W. 471; Perry Co. v. Jefferson Co., 94 Ill. 220; People v. Davenport, 91 N. Y. 585; United States v. Fisher, 2 Cranch, 358; Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069.

John B. & E. P. Sanborn, for respondents.

The proposition for the creation of Red Lake county was submitted to the voters in the manner required by the act. The proposition was carried by a majority of the voters voting thereon. It has been so declared by the proclamation of the governor. That other propositions were also submitted and voted upon ought not to affect the result so far as Red Lake county is concerned. Every presumption is in

favor of the acts of the governor and executive officers appertaining to this matter. State v. County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, and 73 N. W. 631. The decision and the proclamation of the governor are particularly conclusive of the public welfare in a question like this, and the judicial department will not interfere with its conclusion.

START, C. J. This is an information in the nature of quo warranto, whereby the state challenges the corporate existence of the county of Red Lake, which claims to have been created and organized pursuant to Laws 1893, c. 143, as amended by Laws 1895, c. 124.

The facts are admitted, which, so far as here material, are these: On May 8, 1896, there were filed in the office of the secretary of state, pursuant to the act referred to, four petitions for the location and organization of four new counties to be known as "Nelson," "Hill," "Red Lake," and "Garfield," respectively, out of a portion of the territory of the county of Polk as then established and organized. The propositions to create these counties were not inconsistent or competing ones in any respect,—that is, no territory included in any one of such counties was included in any one or more of the others. The total territory proposed to be taken from the county of Polk for these new counties left the original county with an area exceeding the minimum required by the constitution. Each of the petitions was, in substance and form, as required by the statute, and was signed by the required number of electors, except that each of the petitions was largely signed at the same time and by the same electors. Excluding from the petition for Red Lake county the names of all electors who also signed the other petitions, it was not signed by the necessary 25 per cent. of the electors of Polk county; but including such names it had the full legal number of qualified signers.

On July 14, 1896, two other petitions of like form and substance were filed with the secretary of state for the creation of two new counties to be known respectively as "Mills" and "Columbia." Each of the last-named propositions were competing ones with the previous propositions for the creation of the counties of Red Lake and Nelson, and the county of Columbia was also a competing one with that of Garfield; that is, more than one-half the territory of the proposed county of Red Lake, and a portion of that of the proposed

county of Nelson, were included in the proposed county of Mills. A part of the territory of Red Lake county was also included in the proposed county of Columbia, and the last-named county also included a portion of the territory of the proposed county of Garfield.

Such proceedings were had upon all of the petitions, in accordance with the letter of the statute, that the governor of the state issued his proclamations submitting all six of the propositions to the electors of the county of Polk at the next general election. The proclamation as to the first four was issued before the last two petitions were filed. The statute in question contains no express limit to the number of such propositions which may be submitted at the same election, and provides, as amended, that no elector shall vote for or against more than one proposition. State v. Pioneer Press Co., 66 Minn. 536, 68 N. W. 769.

The votes for and against the six propositions respectively were as follows: Proposition to create Nelson county: Yes, 765; no, 1,050. Proposition to create Garfield county: Yes, 603; no, 608. Proposition to create Hill county: Yes, 553; no, 1,574. Proposition to create Red Lake county: Yes, 992; no, 449. Proposition to create Mills county: Yes, 334; no, 56. Proposition to create Columbia county: Yes, 575; no, 107. The votes were duly canvassed by the state canvassing board as here stated. Thereupon the governor duly issued his proclamation declaring the proposition for the creation and organization of the county of Red Lake adopted. Thereafter the individual defendants herein, who were named in the petition as the first county commissioners of the new county of Red Lake, met and duly qualified as the first board of county commissioners thereof, and are now acting as such. The governor has not issued any proclamation as to either of the proposed counties of Mills or Columbia.

1. The state claims that Laws 1893, c. 143, the title whereof is "An act to provide for the creation and organization of new counties and government of the same," is unconstitutional, for the reason that its subject-matter is not expressed in its title, as required by article 4, § 27, of the state constitution. This constitutional provision has been repeatedly construed by this court, and it is settled that:

"The insertion in a law of matters which may not be verbally indicated by the title, if suggested by it, or connected with, or proper

to the more full accomplishment of, the object so indicated, is held to be in accordance with its spirit; but a more liberal construction cannot be given without letting in the evils which the provision was intended to exclude." State v. Kinsella, 14 Minn. 395, 397 (524).

We are of the opinion that the subject-matter of the act in question is sufficiently expressed in its title.

It is true, as claimed, that the act provides for the change of the boundaries of organized counties, the temporary location of the county seat of the new counties, the organization of towns and school districts therein, and the division of the indebtedness of the old counties from which new counties are created between the old and the new. But these matters are all directly or indirectly connected with or suggested by the subject-matter expressed in the title of the act, and proper to the more full accomplishment of the object indicated by the title. The act is general, and provides for the creation of new counties out of a portion of the territory of any organized counties in the state. No new counties can be so created without changing the boundaries of the existing counties of the state, hence the declared purpose of the act expressed in its title to provide for the creation of new counties necessarily suggests and implies that the boundaries of the old counties are to be changed thereby. The other provisions of the act are either directly connected with, or are incidental to, the organization and government of such new counties. City of Winona v. School Dist., 40 Minn. 13, 41 N. W. 539; State v. Honerud, 66 Minn. 32, 68 N. W. 323.

2. The next claim of the state is that the petition for the creation of Red Lake county is invalid, because many of the petitioners also signed at the same time the petitions for the other three counties. This claim rests upon the proposition that an elector can legally sign only one petition for the creation of new counties pursuant to this statute. The question whether an elector can legally sign two or more competing petitions for the creation of new counties from the territory of the county of which he is then an elector is not involved in this case, and we do not decide it. But we do hold that such elector may legally sign at the same time two or more noncompeting petitions for the creation of new counties; that is, petitions for several new counties to be created out of separate and distinct portions of the territory of the old county, or, in other words, where no

two of the proposed counties are to contain any portion of the same territory. A competing proposition or propositions, as the term is used herein, is the reverse of a noncompeting one, as we have defined it.

The statute contains no limitation as to the number of petitions an elector may sign, but the state claims that the limitation is implied, because the elector can vote for or against but one proposition at the same election; hence he cannot sign any more petitions to have propositions submitted to the electors than he is authorized to vote for. This seems plausible, but it ignores the fact that by the letter and manifest intention of the original act just as many noncompeting propositions for the creation of new counties as there were proper petitions for could be submitted at the same election, and that each elector was authorized to vote on each and every proposition.

It is obvious that, if there had been no amendment of the statute limiting this right of the elector to vote on all of the propositions, there could be no question of his right, in view of the provisions of the statute, to sign just as many petitions for the creation of new counties as he had a right to vote for or against. But the amendment of the original act by that of 1895 made no change whatever as to the form or substance of the petitions, or the qualification of the signers thereof. The amendment, without limiting the number of propositions that might be submitted at the same election, limited the right of the elector to a vote on one proposition, leaving intact his right to sign as many noncompeting petitions as he saw fit.

It is further claimed that the provisions of the general election law for placing the names of candidates upon the official ballots by petition is applicable to a petition to have a proposition for the creation of a new county submitted to the electors under this act. The provisions of the election law referred to provide that, where the office is to be filled by one person only, an elector can sign only one nominating petition, for the simple reason that, if he signs two or more such petitions, they are competing ones. He is attempting to nominate several men for an office to which, by no possibility, can more than one of them be elected. It is apparent that the prohibition of the general election law relied on does not extend to the petitions here in question, which were noncompeting, and asked for the

submission of independent propositions, all of which could be legally voted upon and adopted at the same election. The petition for Red Lake county was legal.

3. The state also claims that the proposition for the creation of the county of Red Lake conflicted with those for Mills and Columbia, and that they defeat each other; that the placing of these conflicting propositions on the same ballot when the elector was forbidden to vote on more than one of them was misleading, and that, in any event, a proposition for a new county must receive, in order to carry, "a majority of all the votes cast upon the whole question of county division." After the submission of the propositions for the creation of the counties of Mills and Columbia, they, as well as the first four propositions, became conflicting or competing ones, and three, at least, of these competing propositions, were in form declared carried. This result is unique. Three new counties created and to be organized out of a portion of the same territory; the same territory and its inhabitants within and subject, at the same time, to the jurisdiction of three counties. Such will be the result if the statute is to be construed and given effect according to its strict letter. No such absurd result was intended by this statute.

The actual result of the voting on these six propositions and the points urged by the state in this connection suggest two questions: (a) Does the statute authorize the submission of conflicting or competing propositions? (b) If so, can any one of them be adopted by a majority of the votes cast thereon, unless it also receives more votes than any of its competitors? The strict letter of the statute would require an affirmative answer to each of the questions. But the statute must receive a sensible construction, and one which will avoid results which are both absurd and a menace to the peace and order of the state. General terms of a statute must be so limited in their application, and such exceptions to its general language be implied as to avoid absurd and unjust consequences. It is manifest that the statute cannot be construed so as to answer both questions in the affirmative, for the legislature never intended the consequences which would follow a literal adherence to the statute. One of these questions must be answered in the negative.

Mr. Justice BUCK and I are of the opinion that the statute does not authorize the submission of conflicting or competing petitions;

that petitions which are first filed and found to conform to the requirements of the law should be submitted, and that petitions subsequently filed, which compete with those already filed, should be refused; that such conflicting petitions are excepted by implication from the general language of the statute directing the submission of all propositions for the creation of new counties which are supported by legal petitions. See State v. Armstrong, 30 Neb. 493, 46 N. W. 618.

A majority of the members of the court, however, are of the opinion that this construction of the statute is not justified by the specific directions of the statute requiring the submission of all propositions where the petitions therefor are found to conform to law, and that the statute must be construed as requiring the submission of all legal petitions whether conflicting or otherwise.

Accepting this construction of the statute, it follows that the second question must be answered in the negative, for, if several competing propositions are submitted and voted upon at the same election, and if each of two or more of them receive a majority of the votes cast thereon without receiving a plurality of the votes cast on the several competing propositions all of them are defeated. It is no more possible for all or any two of three proposed new counties competing with each other at the same election for the same territory to be declared, as a result of the election, entitled to the same territory, than it is for all or any two of three competing candidates for an office which is to be filled by one person only, to be declared elected. While the statute states in general language that any proposition for the creation of a new county shall be declared adopted if it receives a majority of the votes cast thereon; yet it is absolutely certain that the legislature never intended that a competing proposition should be carried unless it also secured a plurality vote over all of its competitors. An intention to provide for the creation of three counties in part out of the same territory cannot be imputed to the legislature. From the whole purview of the statute, and a consideration of the manifest intention of the legislature in framing it, and the absurd and harmful consequences of following its strict letter, our construction of this statute is that competing propositions for new counties may be submitted at the same election, but only one can be adopted; and to secure such result it must receive not

only a majority of the votes cast thereon, but also a plurality of the votes cast on the competing propositions; that is, it must receive a larger affirmative vote than any of its competitors or rival candidates for countyhood.

The proposition to create the county of Red Lake received both a majority of the votes cast on that proposition and a plurality over its competitors, and it follows, from our construction of the statute, that it was adopted, and that the competing propositions for the creation of the counties of Mills and Columbia were both defeated. It also follows that there were no unauthorized propositions printed on the ballots; and that the latter were not misleading; and, lastly, that the county of Red Lake was legally created and organized.

Writ discharged.

THEODORE STREISSGUTH v. JOHN GEIB and Others.[1]

February 2, 1897.

Nos. 10,234—(226).

Change of County Seat—Competing Petition.

Where a petition for the change of a county seat, in due form and in fact containing the required number of signatures, has been presented, no competing petition can be received or acted on until an election has been held on the first petition, and until the expiration of five years thereafter, or until it has been withdrawn without an election.

Same—Injunction.

Injunction will lie to prevent unauthorized action by the board of county commissioners and county auditor on such second petition.

Appeal by defendants from an order of the district court for Sibley county, Cadwell, J., denying a motion to dissolve an injunction. Affirmed.

Geo. A. McKenzie and *Somerville & Olsen*, for appellants.

McClelland & Tifft, *John Lind*, and *P. A. Cosgrove*, for respondent.

[1] Reported in 69 N. W. 1097.

MITCHELL, J. In December, 1895, pursuant to Laws 1889, c. 174,[2] a petition (in due form and signed by the required number of legal voters) for the change of the county seat of Sibley county to the village of Arlington was presented to and filed with the county auditor. When the board of county commissioners met, in January, 1896, to act on this petition, as provided by section 2 of the statute referred to,[3] they erroneously and unlawfully struck off the names of 144 persons, which left less than the required number of signers on the petition. In mandamus proceedings against the board judgment was rendered, in March, 1896, requiring them to reconvene, count the names thus unlawfully stricken off, and file a new certificate. From this judgment the board appealed, and this appeal was pending when this action was brought, but the judgment has since been affirmed. State v. Geib, 66 Minn. 266, 68 N. W. 1081. In April, 1896, and while this appeal was pending, another petition was presented to the county auditor, praying for the change of the county seat to the village of Gaylord. Pursuant to notice given by the county auditor, the board of county commissioners met April 21, 1896, and were about to take action on this petition, and file their certificate of the number of signatures lawfully attached, upon which, when made, the county auditor threatened to fix a time for holding an election thereon. Thereupon the plaintiff brought this action to enjoin the board and the auditor from taking such proposed action.

The statute provides that a petition for the change of county seat must be signed by legal voters to a number equal to not less than 60 per cent. of the whole number voting at the last general election.[4] There could not well be two competing petitions of this kind at the same time. The statute further provides, where a special election has been held for the change of a county seat, no petition for a change shall be received and filed, and no proceedings had upon such petition, until the expiration of five years from the date of such special election; also, that no special election shall be called for voting upon the question of changing any county seat to more than one place at the same time.[5] It is clear, from these provisions, that when a petition in due form, and in fact containing the signatures

[2] G. S. 1894, §§ 647–656.
[3] G. S. 1894, § 648.
[4] G. S. 1894, § 647.
[5] G. S. 1894, § 651.

of the required number of voters, is presented, it has the exclusive right of way, and no other petition can be received or acted on until an election is held upon it, and until the expiration of five years thereafter, or until it has been withdrawn without an election; also, that the board of county commissioners cannot prevent or change this result by unlawfully striking names from the first petition, or by delaying an election upon it by taking an appeal. Upon the facts alleged as above in the complaint, the board of county commissioners had no authority to take action on this second petition; neither would the county auditor have any authority to call an election on any certificate which the board might file. Injunction will lie to prevent such proposed illegal action. Todd v. Rustad, 43 Minn. 500, 46 N. W. 73.

Order affirmed.

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RUSSELL SAGE v. ANDREW RUDNICK.[1]

February 2, 1897.

Nos. 10,237—(251).

Appeal — Conclusiveness of Certificate — Adverse Possession — Acknowledgment of Title.

The certificate of the trial court that the settled case contains all the evidence is not controlling, when the case itself shows the contrary. When the statute of limitation has run in favor of a disseisor, no subsequent acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will devest the title acquired by adverse possession.

Same—Evidence.

But an acknowledgment by the disseisor of the record or paper title, as by accepting a lease from the owner of it, is in the nature of an admission that he had no title, and is competent evidence tending to prove that his possession was not adverse.

Appeal by plaintiff from an order of the district court for Swift county, Powers, J., denying a motion for a new trial. Reversed.

[1] Reported in 69 N. W. 1096.

Owen Morris and *Lyndon A. Smith*, for appellant.
S. H. Hudson and *T. F. Young*, for respondent.

MITCHELL, J. Ejectment. The plaintiff claimed under record title from the United States. The defendant claimed title by adverse possession.

In support of his claim plaintiff introduced in evidence (1) a certified copy of an approved list of lands granted to the state by the act of July 4, 1866,[2] to aid in the construction of the Hastings & Dakota Railroad; (2) a trust deed from the railroad company to the plaintiff; (3) a deed from the state to the plaintiff, as assignee in trust for the railroad company. The defendant makes the point that, while it appears that such documents were introduced in evidence, they are not made a part of the settled case, and therefore the record does not show that plaintiff established any title in himself. The point is not well taken. The record states that the certified list was offered "with special reference to the lands in this case," and the only objection made to it was that it was not properly certified. The deed from the state to plaintiff was received without objection. and the record states that it was a deed of the lands certified in the approved list previously introduced. The court charged the jury that the documents introduced by the plaintiff showed that he was the owner of the land unless the defendant had acquired title by adverse possession. To this instruction the defendant took no exception.

The assignments of error based on the alleged insufficiency of the evidence cannot be considered. While the judge certifies that the case contains all the evidence, yet the case itself shows that it does not. A certain plat or map of the land was introduced, which is not in the record. Much of the testimony of the witnesses as to the topography of the land, and the parts of it which defendant or his father broke up and put under cultivation at different times, was given with reference to this map, and is wholly unintelligible without it. Acker Post v. Carver, 23 Minn. 567; Larson v. Northern Pac. R. Co., 33 Minn. 20, 21 N. W. 836.

There is, however, one error presented by the record on account

[2] 14 U. S. St. 87.

of which a new trial must be granted. On February 20, 1894, the defendant accepted from plaintiff a lease of the premises for a term ending October 1 of the same year. The court at first admitted the lease in evidence, but afterwards withdrew it entirely from the consideration of the jury, on the ground that it was immaterial, for the reason that, if defendant had acquired title at all by adverse possession, he must have done so before this lease was made.

The court, doubtless, had in mind the proposition that, if the statute had already run, so as to toll plaintiff's title, and vest title in the defendant, no subsequent recognition of plaintiff's title, except by deed or other instrument sufficient to pass an estate or interest in land, would devest defendant's title. This is, doubtless, true. It is only a recognition of the owner's title while the occupant's rights are inchoate, and before the statute has run in his favor, that will break the continuity of an adverse possession. Wood, Lim. § 270; Sailor v. Hertzogg, 2 Pa. St. 182. There are a few authorities to the contrary, holding that an acknowledgment of the former owner's title after the statute has run has the same effect as an acknowledgment of a debt barred by statute. Cook v. Long, 27 Ga. 280; Long v. Young, 28 Ga. 130. But they fail to distinguish between a case where the statute merely bars the remedy, and a case where it extinguishes the right of property and vests title in the adverse holder.

But, while the acceptance of this lease would not devest defendant's title if he had already acquired it, yet it was in the nature of an admission that he had no title, and was competent and very material evidence tending to show that he was not holding adversely to the party from whom he accepted the lease. To establish title by prescription, it was just as necessary for defendant to prove that his possession was adverse,—that is, with intent to claim and hold the land as against the plaintiff,—as it was to prove that it was continuous and exclusive. His occupancy might have been merely with intent to wait for the owner to sell, or until he was able to buy. The admission involved in the acceptance of the lease was competent evidence as to the character of his possession, whether made before or after the time the statute would have run, had the possession been adverse. The court ought to have submitted it to the consideration of the jury under proper instructions. Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008. If the evidence had been conclusive that

the statute had run before this lease was accepted, the ruling of the court would not have been error; but the evidence was at least not conclusive upon either the fact of possession or the character of it, and the admission involved in the acceptance of the lease might have turned the scale.

Counsel have not raised or discussed the question whether the familiar doctrine that a tenant cannot dispute his landlord's title has any application to the case, inasmuch as the defendant was already in possession. Therefore we have not considered the question.

Order reversed.

JAMES S. RAY v. GEORGE R. LEWIS and Others.[1]

February 2, 1897.

Nos. 10,247—(207).

Breach of Contract—Damages.

Held, that the evidence was not such as to require an assessment of defendant's damages, for breach of a contract, at a greater sum than that awarded by the trial court.

Garnishee—Liability for Interest.

The rule that a garnishee is not chargeable with interest (as damages for the detention of money), while he is, by the operation of an attachment, restrained from making payment, applies only where he stands in all respects as a mere stakeholder, ready and willing to pay to whomsoever the court directs, and not where he assumes the attitude of a litigant.

Appeal by defendants from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Affirmed.

Exhibit B, referred to in the opinion, was a contract between the Columbian Fire Insurance Company and defendants, by which the company appointed them its general agents for three years for Minnesota, North Dakota and South Dakota. Defendants were to pay all expenses for special agents or adjusters, and all commissions for agents appointed in the above-named states, and were to be allowed

[1] Reported in 69 N. W. 1100.

a gross commission of 30 per cent. on all premiums received and retained by the company, after deducting cancellations and reimbursements. All supplies and policies necessary to transact business, together with all expenses of entering the states, postage, taxes, licenses, expressage, and local board expenses and attorney's fees in litigated cases were to be paid by the company. The company was also to pay defendants a contingent commission of five per cent. on the net profits of the business in the above named states.

The findings of fact referred to in the opinion are as follows:

14. That during the month of February, 1894, and thereafter, the defendants received no premiums whatever upon policies written during said month, but that a large number of policies written theretofore and prior to February 1, 1894, were returned to their office for cancellation. That they paid return premiums upon said cancelled policies to the net amount of two thousand seven hundred thirty-five and 84-100 dollars. That all of said return premiums were paid by the defendants prior to said assignment of said Insurance Company. That during said month defendants incurred expenses in the usual course of business and to which they are entitled to credit to the amount of two hundred fifty-six and 40-100 dollars.

15. That the net value to the defendants of the business of said Insurance Company was approximately three hundred and twenty-five dollars per month, the monthly profits on the said contract averaging that sum during the time the same was in force.

16. That in addition to the business of said Insurance Company the defendants represented other insurance companies as agents therefor, deriving a net profit from said other business of approximately four thousand dollars per annum.

Gilfillan, *Willard & Willard*, for appellants.

William W. Bartlett, for respondent.

MITCHELL, J. The plaintiff, as receiver of the Columbian Fire Insurance Company, brought this action to recover from defendants an amount alleged to be due from them to the insurance company for premiums received by them as its agents under the contract (Exhibit B of the complaint). The defendants set up two defenses,—one on the merits, and the other in abatement. The first was damages (to an amount in excess of plaintiff's claim) caused by a breach by the insurance company of the contract (Exhibit B), the breach consisting of the insolvency and assignment of the company in February, 1894 (Exhibit A of the complaint). The plea in abatement

was that the defendants had been garnished by creditors of the insurance company. The court found:

"That by reason of the assignment of said insurance company, and the consequent breach of its contract with the defendants, they suffered loss to the extent of six hundred dollars."

The court deducted this sum from the amount in the hands of the defendants belonging to the insurance company, and ordered judgment against them for the balance, with interest from the time when, according to the terms of the contract, it ought to have been paid.

There is no foundation for the contention of counsel that the $600 was deducted as a credit to which defendants were entitled under the contract. The terms of the contract show that they were not entitled to any such credit, and the court's findings Nos. 14 to 16, inclusive, show what credits he did allow, and how he arrived at the balance due. Hence the only questions presented by the record and assignments of error are: (1) Did the evidence require a finding that defendants' damages resulting from the breach of the contract were more than $600? (2) Were defendants chargeable with interest during their garnishment?

1. Taking the view of the law most favorable to defendants, to wit, that the breach of the contract was total, and that they were entitled to recover, once for all, damages, present and prospective, resulting from the breach, we are of opinion not only that the evidence was not such as to require a larger award, but also that the amount awarded was at least as large as the evidence would have justified.

Future profits on a contract of this kind are subject to many contingencies, and at best largely conjectural. The amount of profits in the past cannot be taken as the measure of damages, for the earning of these profits required the time and service of the defendants, which, when the contract came to an end, were free to be used in some other business. The evidence shows that this is the case with the defendants. They are all engaged in other work, in which the aggregate of their individual earnings is as great as that of the partnership while acting as agents of the insurance company. The evidence further shows that by reason of doubts as to the credit of

the insurance company the business of the agency had ceased to be profitable some time before the company stopped business and made an assignment. The fact that defendants, at the time of accepting the agency, purchased from the company some of its capital stock, which has since depreciated in value, is not an element of the damages resulting from the breach of the contract.

2. The defendants' debt to the insurance company was not one bearing interest by the agreement of parties, but accrued by way of damages for the wrongful detention of the principal sum. In such case the rule is generally stated to be that a garnishee ought not to be charged with interest while he is, by the legal operation of an attachment, restrained from making payment. But this only applies where the garnishee stands in all respects rectus in curia as a mere stakeholder, ready and willing to pay over to whomsoever the court directs. It never applies to a case where he assumes the attitude of a litigant. Drake, Attachm. § 665. This was the attitude of the defendants in this case. They denied their indebtedness altogether, claiming that their damages more than offset it.

Order affirmed.

THEODORE GLAESER v. CITY OF ST. PAUL.[1]

February 2, 1897.

Nos. 10,273—(258).

Continuance—Setting Aside Default.

Held, that the trial court did not err in relieving the city from a judgment obtained against it by default, and allowing it to answer on the merits.

Appeal by plaintiff from an order of the district court for Ramsey county, Willis, J., vacating a judgment in favor of plaintiff for $765.87, and allowing defendant to answer. Affirmed.

S. C. Olmstead, for appellant.

E. J. Darragh, for respondent.

MITCHELL, J. The summons and complaint were served upon the mayor of the city on July 17, 1896. In default of any appear-

[1] Reported in 69 N. W. 1101.

ance on part of defendant, the plaintiff, on August 13, obtained an order appointing a referee to assess his damages, and on the same day judgment was entered against the city on the referee's report. On August 15 the corporation counsel applied for and obtained an order on plaintiff to show cause on Monday, August 17, at 10 a. m., why the judgment should not be vacated, and the defendant allowed to answer on the merits. This order was served on plaintiff's attorney about noon of Saturday, August 15. The affidavits upon which the order to show cause was granted were accompanied by the proposed answer of the defendant, verified by the assistant city attorney. When the order to show cause came on for hearing, plaintiff's attorney applied for a continuance of the hearing for ten days, on the ground that, because of prior professional engagements, he could not sooner prepare for argument. The court refused to grant the continuance, proceeded with the hearing, and granted defendant's motion.

1. The first error assigned is the refusal of the court to grant plaintiff's counsel a postponement of the hearing. The time between the service of the order and the return day was so short that ordinarily a court would grant counsel additional time for preparation. But it does not appear that any considerable time for preparation was necessary. It was not suggested that it was desired to prepare any counter affidavits. All the preparation that was needed was to examine the affidavits and proposed answer upon which the order to show cause was granted, so as to ascertain whether they made a case entitling the defendant to the relief asked for on the ground of mistake, inadvertence, or excusable neglect. These papers were quite brief, and the subject is one with which the profession is quite familiar, and it would seem that the time which counsel devoted to preparing an affidavit for a postponement would itself have been sufficient in which to make all needed preparation by an attorney of any considerable experience.

2. The substance of the defendant's affidavits was that the corporation counsel, whose duty it is to attend to the defense of all suits against the city, never knew that this action had been brought until after judgment was entered; that the summons and complaint were never delivered to them or brought to their attention,—the mayor, or those in his office, having, through inadvertence or neglect, failed

to deliver the papers to them. While certain verbal criticisms are made upon the affidavit of the assistant corporation counsel, yet, fairly construed, it is to the effect that he had examined into the merits of the case, and made a careful survey of all the facts upon which the action was based, and that he believed the city had a good and meritorious defense. Allowing the defendant to answer would not delay the trial of the case beyond the time when it could have been tried had an answer been seasonably interposed.

Under the circumstances, we could not hold that the court abused its discretion in relieving the city from the default. Conceding that the mayor was negligent in not calling the attention of the corporation counsel to the fact that such an action had been commenced, yet this was, under the circumstances, the kind of mistake, inadvertence, or neglect from the result of which the statute intended to allow the court to grant relief, in the exercise of a sound discretion. While municipal corporations are subject to the same rules as other litigants, yet, in the application of these rules, regard must be had to the fact that such corporations are not natural persons, but have to act through the agency of public officers.

Order affirmed.

DANIEL H. TOWLE v. J. J. STARZ.[1]

February 2, 1897.

Nos. 10,299—(225).

Certificate of Deposit—Construction — Demand of Payment—Liability of Indorser.

The defendant was sued as indorser on the following certificate of deposit:

"The Bank of Zumbrota.

"Zumbrota, Minn., July 27, 1893.

"J. J. Starz has deposited in this bank two thousand dollars, payable to the order of himself on the return of this certificate properly indorsed, with interest at four per cent. To be left six months. No interest after maturity. Not subject to check.

"[Signed] E. V. Canfield, Cashier."

[1] Reported in 69 N. W. 1098.

Held, that this was a "time," and not a "demand," certificate; that payment was demandable at the expiration of six months, and, as between the holder and the indorser, it matured at that date; that, to hold the indorser, it should have been presented for payment on the last day of grace, January 30, 1894.

Appeal by plaintiff from an order of the district court for Goodhue county, Williston, J., denying a motion for a new trial, after a verdict in favor of defendant directed by the court. Affirmed.

Wilson & Foot, for appellant.

The certificate in issue, omitting that part of the certificate beginning with the words "To be left," is substantially the same as that in the case of Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910. In construing the words "To be left six months. No interest after maturity. Not subject to check" the court will take judicial notice that the country was undergoing a severe panic, and the banks of the country, to prevent presentment at any time of its paper, placed words of restriction in their certificates so as to prevent a depositor from making a demand until after the lapse of a certain time. A promise to pay on demand after a certain number of days or months is the legal effect of this certificate. Heywood v. Perrin, 10 Pick. 228; Franklin Sav. Inst. v. Reed, 125 Mass. 365; Tiedeman, C. P. § 41; 1 Randolph, C. P. § 120; 1 Daniel, Neg. Inst. § 150; 2 Parsons, N. & B. 540; Edwards. B. & P. N. 146. The words "Not subject to check" are simply superfluous. The relation between the bank and its depositor is simply that of a debtor and creditor. 1 Morse, Bank. § 289.

J. C. McClure, for respondent.

Certificates of deposit are the same as promissory notes. Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910. In the construction of written instruments words are to be given their usual meaning. A business man would construe this certificate to mean that the money was deposited for six months, and that interest would be paid for that period, but thereafter interest would cease because the debt had matured.

MITCHELL, J. The defendant was sued as indorser of the following instrument:

"The Bank of Zumbrota.

"Zumbrota, Minn., July 27, 1893.

"J. J. Starz has deposited in this bank two thousand dollars, payable to the order of himself on the return of this certificate properly indorsed, with interest at four per cent. To be left six months. No interest after maturity. Not subject to check.

"E. V. Canfield, Cashier."

The certificate was presented at the bank for payment on January 31, 1894, and notice of dishonor given to the defendant on the same day. The only question is whether the demand was seasonably made, so as to hold the indorser.

The court below held that it should have been made on January 30, and hence was one day too late. According to Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910, if it had been a demand certificate (no time of payment being specified), it would fall within the 60-day limitation fixed by G. S. 1894, § 2231, and would have been seasonably presented any time within 60 days after its date. But this was a "time," and not a "demand," certificate, and the section cited has no application. The provision that the money was "to be left six months," emphasized by the word "maturity" in the subsequent provision, which refers to the expiration of six months, clearly means that the certificate was not payable until the expiration of that time. It must, therefore, be construed as if it read payable "six months after date." Whether a special demand, accompanied by a return or tender of the certificate, would be necessary before an action could be brought against the bank, is entirely foreign to the question before us. Payment was demandable at the expiration of six months, and, as between the holder and indorser, the certificate matured at that date. Demand should have been made on the last day of grace, which was January 30th.

Order affirmed.

BUCK, J. I dissent. The words "to be left six months," found in the instrument, is a limitation upon the right of the holder to demand payment until the expiration of that time. His power to make a lawful demand was suspended during this time. When the money was deposited, it became the property of the bank, and it

became the debtor of the depositor to the amount stated in the certificate. If left longer than six months, it would not draw interest after that time, unless a demand was made for its payment, and refusal to pay, because it is expressly stipulated that it shall not draw interest after maturity. The insertion of the words "to be left six months" is a wise provision on the part of the bank, and doubtless adopted as a precautionary measure against runs upon banks in times of great panics. And, thus limiting the time within which its payment could not be enforced, it guards against paying interest upon instruments running for a long time.

To avoid the necessity of hunting up a deposit creditor, the certificate provides that it shall be paid to the order of the depositor himself on the return of the certificate properly indorsed. Of course, the certificate may be legally sold and indorsed, and returned by the assignee or lawful owner and holder. Now, while payment of the certificate in question was suspended for the period of six months from the time the money was left with the bank, it was not payable until presented, and demand made for its payment. I think that this was the intention of the parties to be determined from the face of the instrument. It was left six months, but, if left longer, it was not to draw interest. Money is frequently deposited in banks for better security in keeping, sometimes without drawing interest, but often drawing more or less interest; and I believe it to be a sound principle that such certificates of deposit should be deemed payable only upon presentation and demand of payment, except, perhaps, in cases where the certificate is lost; and what course should in such event be pursued I express no opinion. This would bring the certificate in question within the provisions of G. S. 1894, § 2231, which reads as follows:

"Upon a promissory note payable on demand a demand made at the expiration of sixty days from the date thereof, without grace, or at any time within that term, shall be deemed to be made within a reasonable time; and any act, neglect, or other thing, which by the rules of law and the customs of merchants, is deemed equivalent to a presentment and demand on a note payable at a fixed time or which would dispense with such presentment and demand, if it occurs at or within said term of sixty days, shall be deemed a dishonor thereof, and shall authorize the holder of such note to give notice of the dishonor to the indorser as upon a presentment to the promisor, and his refusal or neglect to pay the same. No present-

ment of such note to the promisor and demand of payment shall charge the indorser, unless made on or before the last day of said term of sixty days."

A demand could not be made until the expiration of six months, but from that date there remained sixty days in which the certificate might become dishonored by presentation, demand, and notice of nonpayment. This was done in the case at bar, at nearly the earliest moment possible. The plaintiff therefore was entitled to maintain his action upon the facts appearing in the record, and, as the trial court erred in its ruling, the order denying the motion for a new trial ought to be reversed.

LEVI L. COOK v. HAZEN M. PARKER.[1]

February 2, 1897.

Nos. 10,341—(227).

Lease—Construction—Forfeiture—Satisfaction.

By a lease for a term of years the lessee covenanted to pay an annual rental, and all taxes and assessments on the demised premises. It was covenanted that the lessees might, at any time within 60 days next preceding the expiration of the term, remove any buildings placed by them on the premises, provided that they should have then paid all rent and taxes due or to accrue up to the end of the term. A right of re-entry in case of nonpayment of rent or taxes was reserved, and one of the conditions of the lease was that, if the lessees should default for 90 days in the payment of rent or taxes, the lease should be terminated, and all rights of the lessees under it forfeited, and the buildings become the property of the lessor. The lessees went into possession and erected buildings worth $11,000. The assignees of the lessees having defaulted in the payment of rent and taxes, the lessor brought an action against them, asking that the amount due for rent and taxes be ascertained by the court, and a time fixed within which it should be paid, and that, if not paid within the time fixed, all rights of the assignees under the lease and to the buildings be adjudged terminated. He obtained judgment as prayed for, the amount due him for rent and taxes being adjudged to be $5,300, and the time within which it should be

[1] Reported in 69 N. W. 1099.

paid fixed at two months. The assignees not having paid within the time fixed, the lessor obtained a final decree adjudging their interest under the lease and in the buildings terminated. Under this judgment he took and still retains possession of the premises and the buildings. *Held* that, by bringing this action, the lessor waived a strict forfeiture, and his right of entry under the terms of the lease, and elected to assume the position of one who applies for and obtains a strict foreclosure of a mortgage or other lien, which operates to satisfy the debt pro tanto, and hence he must be deemed to have accepted the unexpired term of the lease and the buildings erected by the lessees in full satisfaction of his claim for rent and taxes.

Action in the district court for Hennepin county against the receiver of an insolvent corporation to recover $1,486.81 with interest. From an order, Russell, J., denying a motion for a new trial, after findings and order for judgment in favor of plaintiff for $625.72, with interest, defendant appealed. Reversed.

Shaw, Gray, Lancaster & Parker, for appellant.

Any equities that existed against the insolvent at the time of his appointment can be enforced against the receiver. Haggerty v. Palmer, 6 Johns. Ch. 437; Knowles v. Lord, 4 Whart. (Pa.) 500; Maas v. Goodman, 2 Hilt. 275; Griffin v. Marquardt, 17 N. Y. 28; Reed v. Sands, 37 Barb. 185; Willis v. Henderson, 5 Ill. 13. Not having the protection of a bona fide purchaser, he is not bound by the obligations of such a purchaser. Not being a purchaser for value, he is not bound by record notice. There are no allegations in the complaint and no testimony tending to prove appellant assumed the lease. As no claim for rent or taxes was made by respondent, appellant had a right to assume that both had been paid. The buildings being personal property of the insolvent estate, so long as the ground rent and taxes were paid, taking possession of the buildings could not be evidence that appellant assumed the ground lease. An assignee or receiver has a reasonable time within which to elect to assume a lease. Under the circumstances of this case ten months was not an unreasonable time for such election. Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 335; Turner v. Richardson, 7 East, 335.

Respondent collected from Veazie and Barrett all the ground rents which accrued for a period beginning prior to appellant's appointment and ending long subsequent to the time appellant was ousted from the

possession. By reason of the mortgage to Barrett, the latter became an assignee of all the rights of the furniture company, as of the date of the mortgage, and, by reason of the accounting by appellant to the special receiver, Veazie, on whose motion he was appointed, was a tenant of respondent until the expiration of the year for redemption, after which time Barrett was a tenant of respondent. Respondent recognized Veazie as his tenant by the receipt of rent from her. He recognized Barrett similarly, and by bringing suit to foreclose the lease, in which suit appellant was not made a party. Respondent cannot enforce the covenants of his lease for the same period against Barrett and Veazie and also against appellant.

Ripley & Brennan, for respondent.

The assignee of a lease is liable for taxes where the lease provides for their payment by lessee. Trask v. Graham, 47 Minn. 571, 50 N. W. 917; Craig v. Summers, 47 Minn. 189, 49 N. W. 742. See Lewis v. Burr, 8 Bosw. 140; Young v. Peyser, 3 Bosw. 308; Journeay v. Brackley, 1 Hilton (N. Y.) 447; Martin v. Black, 9 Paige Ch. 641; Dorrance v. Jones, 27 Ala. 630; Clark v. Hume, Ryan & M. 207; 2 Taylor, L. & T. § 458; Burrill, Assign. § 374. After forfeiture the tenant cannot counterclaim the value of the buildings, when sued for rent and taxes which accrued prior to the termination of the lease. Finkelmeier v. Bates, 92 N. Y. 172; People's Bank v. Mitchell, 73 N. Y. 406; Paine v. Trinity Church, 7 Hun, 89; Glaser v. Cumisky, 16 N. Y. Supp. 89; Johnston v. Bates, 48 N. Y. Sup. Ct. 180.

To protect their interest in the lease and to prevent a forfeiture the mortgagees paid the rent in arrear. They were not in possession nor entitled to the possession. If the mortgagees were tenants, was the appellant a trespasser or a sub-tenant of the mortgagees?

MITCHELL, J. The material facts may be stated thus:

In January, 1886, the plaintiff, as lessor, and others, as lessees, executed a lease for the term of seven years, by the terms of which the lessees covenanted to pay an annual rental, and all taxes and assessments on the demised premises. It was covenanted in the lease that the lessees, their heirs or assigns, might, at any time within 60 days next preceding the expiration of the term, remove any buildings placed by them upon the premises, provided they should have then paid all rents and taxes due or to accrue up to the expiration of the term. One of the conditions expressed in the lease

was that, if the lessees or their assigns should default for 90 days in the payment of rents or taxes, the lease should become ended and determined, and all rights of the lessees under it forfeited and lapsed, as fully as if it had expired by lapse of time, and all buildings on the premises become the property of the lessor, who should have at once the right of re-entry to the same as if the term of the lease had expired. The lessees assigned to the Liljengren Furniture & Lumber Company, which went into possession, and erected buildings of the value of $11,000, and subsequently executed two mortgages on their leasehold interest. In May, 1890, the plaintiff, as receiver in insolvency of the furniture and lumber company, took possession of the premises, and so remained until March, 1891, when he was required to surrender possession, and account for what rents he had received to a special receiver, appointed in a foreclosure suit instituted by Barrett and Veazie, the mortgagees of the furniture and lumber company. This special receiver remained in possession until these mortgagees acquired title under the foreclosure sale, when they went into possession as assignees of the lessees. In July, 1893, the plaintiff commenced an action against Barrett and Veazie, setting up the terms of the lease, alleging a default in the payment of rent due September 1, 1892, and of taxes for several years, including those for 1890, and asking that the court find the amount due from them on account of unpaid rent and taxes, and fixing the time within which the amount so found due should be paid to plaintiff, and that, in case such amount was not paid within the time fixed, all rights of Barrett and Veazie to the premises and buildings thereon should be terminated. Judgment was rendered in accordance with the prayer of the complaint, adjudging the amount due the plaintiff for rent and taxes, including taxes for 1890, to be $5,248, and fixing the time within which it should be paid at two months. Barrett and Veazie having failed to pay the amount, the plaintiff, after the expiration of the two months, obtained a final decree adjudging that all their rights under the lease in the premises and the buildings thereon were terminated and annulled. Thereupon plaintiff, under and pursuant to this judgment, took, and still retains, possession of the premises and the buildings thereon erected by the lessees, which were worth $11,000.

Plaintiff subsequently brought this action against the defendant to recover the amount of taxes on the leased premises for the year during which plaintiff was in possession as receiver, upon the theory that he had accepted and adopted the lease as assets of the estate of his insolvent, and thereby rendered himself liable on his covenants.

Conceding the law to be with the plaintiff on all other points, there is, in our opinion, one conclusive reason why he cannot maintain this action. We may assume, without deciding, that, if plaintiff

had stood on his right of re-entry under the lease, such re-entry would not have extinguished a right of action which had previously accrued for rent or for taxes. But this was not what he did. He waived the forfeiture and right of entry under the lease by bringing a suit for equitable relief in the nature of a strict foreclosure of an equitable lien or mortgage on the defendant's leasehold interest for the unpaid rent and taxes. Having elected to resort to such a remedy, we think he occupies the same position as a mortgagee who seeks and obtains a strict foreclosure, which operates to satisfy the debt pro tanto.

In this case the claim for rent and taxes was wholly satisfied, because the court finds that the buildings erected by the lessees were worth more than double the amount of plaintiff's claim. Plaintiff's contention, that this judgment was merely a judicial determination that there was a forfeiture and right of entry under the lease, cannot be maintained. The action was not brought on any such theory, nor was the relief asked for and granted consistent with it. Had plaintiff merely asserted his right of re-entry, the tenants would have had, under the statute, six months within which to reinstate the lease and regain possession by paying the amount of rent and taxes in arrear. G. S. 1894, § 5865. The time fixed by the judgment within which the tenants might pay up was fixed at only two months. We need not inquire whether such a judgment was a proper one. It was, at most, merely erroneous, and not void. No new trial is necessary. The findings of fact, which are not assailed, entitle the defendant to judgment.

The cause is remanded, with directions to the court below to amend its conclusions of law, and order judgment for the defendant.

STATE OF MINNESOTA ex rel. H. N. HAGESTAD v. T. A. SULLIVAN and Others.[1]

February 2, 1897.

Nos. 10,457—(301).

Constitution—Laws 1895, c. 229.

Laws 1895, c. 229, entitled "An act to establish municipal courts in incorporated cities having a population of less than 5,000 inhabitants," is not an act "regulating the affairs of cities," within the meaning of section 33, article 4, of the constitution, prohibiting special legislation on certain subjects.

Same—Delegation of Legislative Power.

The fact that the taking effect of the act in a city is made contingent upon a vote of the city counsel does not constitute a delegation of legislative power.

Application by the state of Minnesota, on the relation of H. N. Hagestad, for a writ of prohibition against F. A. Sullivan and others. Order to show cause discharged.

A. C. Wilkinson and *M. O'Brien*, for relator.

A law cannot be uniform in its operation when by its terms it is limited to such portions of the state as may adopt it. Nichols v. Walter, 37 Minn. 264, 269, 33 N. W. 800; State v. Cooley, 56 Minn. 540, 552, 58 N. W. 150; Johnson v. St. Paul & D. R. Co., 43 Minn. 222, 45 N. W. 156. Laws 1895, c. 229, is particularly obnoxious to this rule, because it may be adopted by some cities of the class specified, rejected by others of that class, or not acted upon by still others of the class. It is therefore not of uniform operation throughout the state. Const. art. 4, § 34; State v. Copeland, 66 Minn. 315, 69 N. W. 27.

By Const. art. 4, § 33, the legislature shall not amend a special law. Sp. Laws, 1887, c. 45, is the charter of East Grand Forks. Section 13 of chapter 3 of the act provides that justices of the peace of that city shall have sole jurisdiction of criminal cases, and

[1] Reported in 69 N. W. 1094.

of all prosecutions under any ordinance of the city. Section 2 of chapter 229, Laws 1895, repeals that provision so as to vest such jurisdiction in municipal courts. The later law is therefore void. If the legislature cannot repeal a special law directly, it cannot repeal it indirectly. State v. Sullivan, 62 Minn. 283, 64 N. W. 813.

The act in question delegates to the common council the performance of an act belonging to the legislature under Const. art. 6, § 1. Laws 1895, c. 229, delegates to the common council of the city the power to establish the court. The act is therefore unconstitutional. State v. Simons, 32 Minn. 540, 21 N. W. 750.

Warner, Richardson & Lawrence, for respondents.

The establishment of a court is authorized by Const. art. 6, § 1, and Laws 1895, c. 229, was passed by a two-thirds vote of both branches of the legislature. Senate Journal, 414–598; House Journal, 482–594; Clem v. State, 33 Ind. 418; State v. County Court, 50 Mo. 317; Burch v. Hardwicke, 30 Grat. 24; People v. Hurlbut, 24 Mich. 44; People v. Wilson, 15 Ill. 388; Hercules Iron Works v. Elgin, J. & E. Ry. Co., 141 Ill. 491, 30 N. E. 1050; Knickerbocker v. People, 102 Ill. 218; Cummings v. Chicago, 144 Ill. 563, 33 N. E. 854; Jenkins v. State, 93 Ga. 1, 18 S. E. 992; Burke v. St. Paul, M. & M. Ry. Co., 35 Minn. 172, 28 N. W. 190; People v. Curley, 5 Colo. 412; Darrow v. People, 8 Colo. 420, 8 Pac. 661; State v. Berka, 20 Neb. 375, 30 N. W. 267; People v. Rucker, 5 Colo. 455.

The court should not construe a law so as to shock the moral sense and conscience. Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069; National N. H. Bank v. Northwestern G. L. Co., 61 Minn. 375, 63 N. W. 1079. See Laws 1893, cc. 100, 148, 149, 163, 195, 196, 200, 204, 205. If the court declares all municipal courts organized under this law invalid, these courts were not even de facto courts and their acts are null and void ab initio. If this law is declared invalid then all the laws cited authorizing the issue of bonds are likewise invalid.

MITCHELL, J. By its application for an absolute writ of prohibition against the respondent Sullivan to restrain him from acting as judge of the municipal court of the city of East Grand Forks, the state challenges the constitutionality of Laws 1895, c. 229, en-

titled "An act to establish municipal courts in incorporated cities having a population of less than 5,000 inhabitants."

The act in question, after providing that there is thereby established a municipal court in each incorporated city in the state having a population of less than 5,000, then provides that such court shall be a court of record, and shall have jurisdiction of civil actions at law where the amount in controversy does not exceed $500, and shall have exclusive jurisdiction of all criminal complaints and examinations, and trials of criminal cases arising or triable within such city, heretofore triable before a justice of the peace, and that its jurisdiction shall be co-extensive with the limits of the county in which the city is situated. It excepts from its jurisdiction the classes of civil actions usually excepted in municipal court acts, such as divorce, libel, slander, and the like, and also actions involving the title to real estate. The judge of this court is to be elected by the qualified electors of the city at the general city election. Any vacancy in the office is to be filled by the governor of the state. The judge must be a qualified elector of the city, and he is given the general powers of judges of courts of record. The court must be held within the city. It is given full power and authority to issue all process, civil and criminal, necessary and proper to carry into effect the jurisdiction given to it by law, and its process may be directed for service to any police officer, marshal, or constable of the city, or to the sheriff of the county.

The act prescribes a complete code of procedure and practice in such courts. Section 7 provides that its judge shall be the chief magistrate of the city, and shall see that all criminal laws of the state, and the ordinances, laws, regulations, and by-laws of the city, are observed and executed. The city attorney has charge of the prosecution of all criminal cases for violations of city ordinances, and the county attorney of those for the violation of laws of the state, and, when the defendant is discharged or acquitted, the city is to pay the costs in the former and the county in the latter. All appeals from the judgments or orders of such courts are taken to the district court, in like manner and subject to the same rules of practice as in appeals from justices of the peace. After thus providing in positive terms for the establishment of a municipal court in every city in the state having a population of less than 5,000, the

act closes with section 39, which gives rise to the controversy in this case, and which reads as follows:

"Any city in the class mentioned in the title of this act which may wish to avail itself of the provisions of this act shall do so by a resolution of its common council, expressly accepting the provisions hereof, which resolution shall be adopted by vote of four-fifths of all the members of such council, and be approved by the mayor of such city; and this act shall not apply to any such city until the adoption as aforesaid of such resolution."

It is urged that, in view of the option thus given to each city whether the law shall apply to it, the act is unconstitutional because —First, it is special legislation "regulating the affairs of cities," within the meaning of section 33, article 4, of the constitution of the state; and, second, that it is a delegation of legislative power to the common councils of cities. A third and subsidiary point, to wit, that it is an amendment of a special act (the charter of East Grand Forks) by a special act, is included in the first point, and need not be separately considered.

1. We are of opinion that the act in question is not one "regulating the affairs of cities," within the meaning of the constitution.

It will be observed that the powers and duties of the courts provided for are purely and exclusively judicial. They have neither administrative nor legislative powers in the affairs of the municipalities. It is true that the judge is chosen by the electors of the city, and the court is to be held within the limits of the city, and is doubtless designed for the special convenience of its inhabitants; but this does not, in any proper sense, render the judge a municipal officer of the city, or the court a department of its municipal government. Its jurisdiction, within the limitations prescribed, is general, and not confined to the city, or to the inhabitants of the city. Although inferior in rank, it is as much a court of the state as is the district or probate court. The fact that it is given exclusive jurisdiction of criminal cases under either state laws or city ordinances, arising or triable within the city, or that its judge is made the "chief magistrate" of the city, does not affect the character of the court, or make it a department of the municipal government. It is one of the courts, inferior to the supreme court, which the legislature is authorized to establish by section 1, article 6, of the constitution of the state.

Under this section the legislature had the power, frequently exercised, to establish a local court for the convenience of a particular locality; as, for example, the courts of common pleas in the cities of St. Paul and Minneapolis. This they could do whenever, in their judgment, a necessity for it arose. Although section 33, article 4, of the constitution was adopted subsequently, yet we do not think it has, or was intended to have, the effect of limiting the power of the legislature, under section 1, article 6, to establish courts inferior to the supreme court. Ramsey county is a judicial district by itself. The judges of the district court are chosen by its electors, and are paid in part out of the county treasury. Would it be claimed that an act providing for additional judges of the district court in that county would be an act regulating the affairs of the county, within the meaning of the constitution? Or would an act changing the time of holding terms of the district court in a particular county be a law regulating the affairs of that county? We think not. We fail to see the distinction, in principle, between this case and the cases supposed. The mere fact that, in the exercise of judicial power, a municipal court is given exclusive jurisdiction of prosecution for violations of municipal ordinances, as already suggested, does not alter the case.

A constitutional provision or a statute must be adhered to and enforced, whether it works well or ill in practice; but this constitutional inhibition against special legislation must receive a reasonable and practical construction, and not be given a strained one, so as to tie the hands of the legislature beyond the intention of the people, as fairly indicated by its terms. Moreover, a cardinal rule in all such cases is that every reasonable doubt must be resolved in favor of the constitutionality of a legislative act. Special circumstances frequently create a necessity for the establishment of a local court in one locality which does not exist in others. It would be very difficult, if not impossible, to meet all these diverse conditions by a general law of uniform operation throughout the state. We could not say that the people, by adopting section 33, article 4, intended to limit the power of the legislature to establish new courts to the enactment of general laws of uniform operation.

2. The remaining question is whether the act delegates legislative power to the city councils.

We have neither the time nor the inclination to enter into any extended discussion of the much-mooted question of what does, and what does not, amount to a delegation of legislative power. One of the settled maxims in constitutional law is that legislative power cannot be delegated. It must be exercised by the legislature itself, to whom alone the people have conferred the power to make laws. But it is equally well settled that it is not always essential that a legislative act must in any event take effect as law after it leaves the hands of the legislature. If the law is, in its provisions, a complete statute in other respects when it leaves the legislature, its taking effect may be made conditional upon some subsequent event. When that event happens, the statute takes effect, and becomes the law, by force of legislative action, as fully as if they had unconditionally fixed the time when it should take effect. Such a law is not incomplete.

The only matter not absolutely determined by the legislature is the expediency of its going into operation, and that is made contingent upon the happening of a certain event, or the existence of certain circumstances. There are certain subjects of such a character that the operation of laws in respect to them peculiarly affect certain localities. In such case the willingness of the parties concerned to accept the law or avail themselves of its provisions is often made the contingency upon which its operation is made to depend. This municipal court act is of that character, and the legislature might properly make its operation in a particular city contingent upon the happening of some event or the doing of some act which would indicate the desire of its inhabitants to avail themselves of the provisions of the law. The legislature itself has declared what the law shall be when it takes effect, and also upon what contingency it shall take effect, and when that contingency happens it takes effect by force of the legislative will. This does not amount to a delegation of legislative power.

Order to show cause discharged.

VILLAGE OF WAYZATA v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 3, 1897.

Nos. 10,057—(26).

Res Judicata—Identity of Issues.

The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and in substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not,—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression,—then the truth is not excluded, and the judgment is no answer to the different issue.

Same.

Held, that the finding of fact made by the trial court, in substance that the defendant's plea of a previous adjudication of the subject of the present action had been proven and established, is not supported by the evidence.

Railway along Highway—Necessity.

Under a law which authorizes a railroad company to construct its road along and over any public or private way, if it shall "be necessary," a practical, and not an absolute, necessity is intended; and the burden of proof would be upon the company to show this practical necessity, if questioned when originally locating the line.

Same.

The necessity upon which the company acted when first establishing the line and when building the road is presumed to be continuous, and to exist, in proceedings instituted to compel a change of the track and its appurtenances.

Same—Burden of Proof.

In such proceedings the burden of proof is upon the party demanding a change of the line, as constructed and used, to show, by clear and convincing testimony, not only that the original necessity no longer exists, but that there are substantial reasons for holding that the public interests demand that a change be made. Testimony which would warrant a court, on a hearing to locate a line, in finding that the public interests required it to be located elsewhere than upon a particular public or private way, would not uphold a like finding where the proceeding was to change and remove a line already constructed and in operation.

[1] Reported in 69 N. W. 1073.

Finding Sustained.

Held, in a proceeding to compel defendant railway company to remove its tracks and appurtenances from a certain street in plaintiff village, and to locate them elsewhere, that a finding to the effect that a more practical, feasible, and convenient route for such tracks and appurtenances, or one which would less interfere with the safety and convenience of the public, or afford less obstruction to the public ways in said village, than the one now occupied, could not be found, is sustained by the evidence.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

Welch, Hayne & Conlin, for appellant.

The decision in the former action was based on the fact that it was necessary to make connection with lake traffic at that point on Lake street, and that the defendant then maintained and used these facilities for connection with such traffic. The issue in the present action is whether defendant has a right to occupy this street when it has removed all those facilities for such connection. Whether the doctrine of res judicata applies in a given case is determined by whether the evidence necessary to support or contradict the issue involved in the former decision is the same and sufficient to support or contradict the issue in the subsequent case. West v. Hennessey, 58 Minn. 133, 59 N. W. 984; Marsh v. Masterton, 101 N. Y. 407, 5 N. E. 59; 21 Am. & Eng. Enc. Law, 233; Palmer v. Hussey, 87 N. Y. 303; Cromwell v. County of Sac, 94 U. S. 351; Betts v. Starr, 5 Conn. 553; Belden v. State, 103 N. Y. 1, 8 N. E. 363.

W. E. Dodge, for respondent.

The cause of action in the first and second suits is identical. Cromwell v. County of Sac, 94 U. S. 351; Thompson v. Myrick, 24 Minn. 4; Harris v. Harris, 36 Barb. 88; State of Wisconsin v. Torinus, 28 Minn. 175, 9 N. W. 725; Gage v. Holmes, 12 Gray, 428; Dwyer v. Goran, 29 Iowa, 126; Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Steinbach v. Relief F. I. Co., 77 N. Y. 498; Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113.

COLLINS, J.[2] This action was brought to enjoin and prohibit defendant railway company from keeping and maintaining its double

[2] Buck, J., took no part in this case.

tracks and telegraph poles on Lake street, in plaintiff village, and, as a consequence, to compel the removal of said tracks and poles from said street, where they now are. It is, in the main, a renewal of the controversy which formerly existed between these parties, and was supposed to have been terminated in an action which was determined in this court in 1892. Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438, 52 N. W. 913.

The right of the defendant at that time to keep and maintain said double tracks and telegraph poles on said Lake street, upon the performance of certain conditions, which involved a slight change in the location of the tracks, the removal of side tracks and other obstructions from the street, the making and maintaining of public crossings at certain points, and also making provision for suitable and convenient access to the water, was distinctly affirmed in that action. From the evidence herein, it is shown that, immediately upon the entry of final judgment in that case, defendant not only removed its side tracks and other obstructions from the street, as required to do, but it also removed its wharves and steamboat landings and its station and depot buildings from the village limits; establishing a new station and new wharves about one mile east of the old, and also locating a flag station for some trains at a point west about one-fourth of a mile. It left nothing whatsoever in the street, or within the limits of the village, except its tracks and the telegraph poles. These it has maintained along Lake street, running daily a large number of trains through the street at a rate of speed varying from 20 to 30 miles an hour.

That the village and its people have been and are seriously injured and damaged by the removal of the station, and the running of trains in the middle of the street at this rate of speed, cannot be doubted, but these facts do not control the case now before us. It was brought upon the ground that as the necessity for depot facilities upon Lake street, and at the point where the depot buildings then stood, had been obviated and removed by the action of defendant in taking away its depot buildings and its adjacent wharves and landings, the necessity for maintaining its tracks and poles in the street had ceased. As both were a very serious injury and detriment to the use by the people of the water front, the good of the public, it was alleged, imperatively demanded their removal to

the north, and to a route through the village which, while equally as feasible for defendant, would interfere much less with a proper use of the water front by the inhabitants of the village. And in the answer, and upon the trial, defendant contended, among other things, that the whole subject-matter of the present litigation had been fully and finally determined by the judgment entered in the former action, and was not open for discussion or decision, no matter what new conditions had arisen. On findings of fact (two in number), the court below ordered judgment in defendant's favor, and this appeal is from an order denying plaintiff's motion for a new trial.

These findings were, in substance: First, that there was "no more" practical, feasible, or convenient route for defendant's tracks and telegraph poles into and through the village, or one which would less interfere with the safety and convenience of the public, or afford less obstruction to the public streets and highways in the village, than that already occupied; second, that each and every allegation of fact, as set forth in the answer in defendant's plea of previous adjudication of the subject of the present litigation, had been proven and established on the trial, each and all of said allegations being incorporated into the finding.

By the assignments of error it is asserted that neither of these findings is supported by the evidence, and that the court erred in its conclusion of law based thereon. These findings are wholly disconnected and independent, so that it is not necessary, in order to sustain the conclusion of law, that both should be supported by the proofs. One refers solely to the practicability, feasibility, and convenience of a route through the village, and, upon the evidence, determines that no other route would interfere less with the safety and convenience of the people than the one now pursued, or afford less obstruction to the public streets and highways of the village, while the other pertains solely to the plea of res judicata found in the answer, and set up as a complete bar to the cause of action. So that, if the second finding was justified by the proofs, the conclusion of law was correct, and no further consideration of this appeal would be required. In such case the first finding would become immaterial. If, upon the other hand, the evidence failed to sustain the plea in bar, no conclusion of law ordering judgment for defendant wholly predicated upon the second finding could be sanctioned.

We quite agree with counsel for plaintiff in their claim that the second finding was not warranted by the proofs submitted in support of the plea of former adjudication. The issues in the other action involved the right of defendant to maintain its tracks and adjuncts thereto, including station buildings, side tracks, and telegraph poles, on the streets of the village, as it then did, and had for many years, the complaint alleging that the right did not exist. The answer averred the existence of the right originating by virtue of an act of the territorial legislature conferring the right, if it should be necessary, and then alleged that it was necessary for the purpose of directly connecting the traffic by rail with the traffic by water, and that the necessity remained. The court, upon the trial, found that the legislative act gave the right to defendant's predecessor; that the right was duly exercised and acted upon; that it was necessary that the railway approach the lake so as to make direct connection with it in carrying passengers and freight to be carried on both the lake and the railway; that, in order to make this connection, it was necessary to make it at the point on Lake street where it was made, and then pass over and along the street; and, further, "that the same condition of things and the same necessity has ever since existed and still exists."

At that time the defendant maintained a station with a passenger and freight depot at the village. It also maintained, in close proximity to the depot, wharves, and landings for boats plying upon the lake, thus affording facilities for joint traffic on the lake and by rail. It connected this traffic at this particular point, and by these facilities; and, to do this, the necessity for the occupation of Lake street by its tracks first arose, had since existed, and continued to exist at the time of the trial of the former action. It was these conditions, continuing and existing at the time of the trial, which largely influenced the court when making the finding from which we have quoted, and it is evident that this finding was quite potent in the final determination of the case. As made, the finding was upon the facts as they then existed. The conclusion of law, in so far as it was rested on this finding, was an application of legal principles to the facts as found, not to others which might arise in the future and be presented for adjudication.

And, from the pleadings and the proofs in the present action, it is undisputed that an entirely different condition of things exists, and that a radical change has been made in the situation by the act of defendant after the final judgment was entered in the former action. The mandate of the court was obeyed to the letter, it is claimed; and, in addition to this, the defendant went further, and removed all of its station buildings, and abandoned its station. It not only removed the obstruction which it was commanded to remove, but also took away its facilities for connecting the rail traffic with that upon the lake. With the wholesale removal and absolute abandonment of all connection with the lake traffic, and the establishment of a new station and other connecting facilities at another point, there can be no pretense that there now remains the same necessity as that which formerly existed. Under such circumstances, the issues presented in this case are not identical with those before the court in the former action.

The test to be applied is whether the same evidence will sustain both the former and the present action. If a party alleges a certain state of facts as his cause of action, and is defeated, it is no bar to recovery on another statement of facts constituting a different cause of action, although the transaction referred to and the relief sought in both actions are the same. West v. Hennessey, 58 Minn. 133, 59 N. W. 984.

"The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not again be contested; but, if it has not,—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression,—then the truth is not excluded, and the judgment no answer to the different issue." Palmer v. Hussey, 87 N. Y. 303, 306.

On the facts as they were shown to exist at the time of the trial of the present action, the plaintiff, instead of seeking to contradict and overturn the former judgment, claimed the benefit of and relied upon it.

As the second finding of fact was unsupported by the evidence, we now turn to a consideration of the claim that the first finding is without evidence to sustain it. The only testimony received on the

trial in reference to the matters covered by the first finding was that offered by the plaintiff, through two witnesses,—one the president of the village council, the other a civil engineer.

The former testified as to the great inconvenience in reaching the water's edge from the village, the buildings therein being north of the double tracks, and also the hazard and danger in using Lake street, the principal business thoroughfare, for the passage of teams, with many trains running thereon at a high rate of speed, and at all hours. That it clearly appeared from this evidence that the safety and convenience of the public, and its right to free access to a navigable body of water, had been greatly interfered with and obstructed by the operation of defendant's trains, cannot be doubted.

The engineer testified as to the feasibility of another route for defendant's railway through the village, by changing the line of road for something more than one mile, and produced a map of his proposed route, made from an actual survey. If this plan were adopted, the tracks through the village would be transferred from Lake street to a line nearly parallel with the street, about 300 feet northerly, and through the center of the three blocks which abut on Lake street. See plat, 50 Minn. 441, 52 N. W. 913. The new line would be about 150 feet longer than the old. From the map produced by the engineer, it seems that for about 400 feet the new route would be upon a county road, and would then cross four streets which intersect Lake avenue at right angles south of the proposed crossings. After testifying as to the length of the proposed route, the curves, the depth of cuts and height of fills which would have to be made, the engineer was permitted to give his opinion (defendant's counsel objecting) that there was no physical necessity, by reason of the condition or surface of the ground in that vicinity, for the retention and maintenance of defendant's tracks upon Lake street.

There was no evidence as to how this change would affect the operation of defendant's road as a whole, or the convenience of the traveling public, or the rights of property holders along the new route, or the property over which it would have to pass. There was no testimony as to what expense the defendant might incur should it attempt to change its line, or how serious the change might be to the inhabitants of the village residing north of the proposed line. It seems to have been assumed by the plaintiff that because the

tracks and poles are now, as the tracks are used, an obstruction to free and convenient access to the lake, and a great impediment to those who would navigate its waters, they would be little or no obstruction or inconvenience to the people of the village if placed elsewhere, where, as a matter of fact, the inconvenience and obstruction in some other way, or to inhabitants who have no desire or occasion to visit the lake, might be much greater and more serious. It seems also to have been assumed that there would be less hazard and risk to the traveling public if trains running at a high rate of speed were driven out from behind buildings situated upon the blocks we have referred to, and directly across streets, than there would be if these trains ran along a street where they could be seen at a much greater distance, and a better opportunity afforded to avoid them. In fact, had the court below attempted to find that the proposed route would interfere less with the safety and convenience of the public, or afford less obstruction to the public streets and highways, except, perhaps, in respect to the means of access to the lake shore, the finding would have been without evidence to support it.

When examining the proofs on which the finding now in question was founded, it must be borne in mind that this was a proceeding to compel the removal of defendant's line from where it had been located and operated for many years, and not a proceeding involving an original location. The statute which authorized the occupation of the street in the first instance, and under which defendant's predecessor acted more than 25 years ago, conferred the right to construct a road upon, along, and over any public or private highway, "if the same shall be necessary." [a] By providing that a public or private way might be occupied if "necessary," the territorial legislature meant a practical, and not an absolute, necessity. As stated in Buck v. Seymour, 46 Conn. 156:

"Property was to be regarded as 'necessary' for the operation of the road if it was such as the company, in the reasonable exercise of its discretion, considered it best to procure for the most profitable use of the road to itself, and the most beneficial use of it to the public."

And when exercising the right to appropriate the way, and to construct the railway line along and upon it, the burden of proof must

[a] Laws 1857, Ex. S. c. 1, § 7.

be upon the corporation to show the necessity. If shown, and the road is built, the necessity must be presumed to be continuous and to exist until, in a proper proceeding, it is overcome by clear and convincing evidence.

So in this case the plaintiff was not only met with the presumption, but it was also confronted with the former adjudication,—a bar to further proceedings unless it was shown that the conditions on which the adjudication was based had wholly changed. Realizing this, plaintiff introduced evidence to establish its contention that these conditions had changed, and also that it was no longer necessary that defendant should occupy Lake street, and, further, that public rights required a removal of the tracks to another locality. It admitted—what is undoubtedly true—that the burden of proof was upon it to show, not only that the necessity no longer existed, but that there were substantial grounds for a finding of the court that a more feasible, practicable, and convenient route could be obtained, and that the safety and convenience of the public demanded a change in the line at this particular point, and also that the proposed change would less obstruct the streets and highways of the village than the line in use.

Not only was the burden upon plaintiff in these respects, but a finding in its favor upon so important a matter would have to be based upon clear and convincing testimony. Evidence which would warrant a court, on a hearing to locate a railway line in the first instance, in finding that the public interests required it to be elsewhere located than upon some particular private or public way, would not necessarily uphold a like finding when the proceeding was to change and remove a line already constructed and in operation. If the rule we have announced was not the true one, every railroad company could be compelled to alter an established route at the caprice of a local public, as often as demanded, and almost without regard to the original decision upon the question of necessity, the interest of the general public, or the cost of alteration. Companies would be continually harassed by reason of changed conditions, and upon the ground that local necessities arising subsequent to the original location absolutely demanded alteration here and there in the general system and plan of the entire line.

Taking into consideration the character of the evidence received

in support of plaintiff's contention, of which a synopsis has already been given, and measuring it by the rule which must certainly govern in cases where a change in the location of railway tracks and appurtenances is demanded, in connection with the entire situation and circumstances, we cannot indorse the contention of plaintiff's counsel that the only finding which could have been made upon the evidence, and the only conclusion of law to follow, should have been in direct opposition to those presented for review.

Order affirmed.

ANNIE MOORE v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 8, 1897.

Nos. 10,243—(223).

Railway—Injury to Employé—Negligence of Master.

In this action, which was brought against a railroad company to recover damages for the killing of plaintiff's intestate, a yard switchman, it is *held* that, upon the facts as shown upon the trial and conceded by both parties, the plaintiff failed to prove any negligent act upon defendant's part upon which to sustain a verdict in her favor.

Same—Disregard of Custom.

When it is established, upon the trial of a case, that a custom in regard to the operation of trains, designed for the protection of employés, has been unobserved and disregarded, but it appears conclusively that an observance of the custom would have been of no service or value in the particular case, a verdict for damages cannot be based solely on the failure to observe this custom.

Action in the district court for Hennepin county. The case was tried before Pond, J., and a jury, which rendered a verdict in favor of plaintiff for $4,166.67. A motion on the part of defendant for judgment notwithstanding the verdict was denied, and from a judgment entered pursuant to the verdict defendant appealed. Reversed.

W. E. Dodge, for appellant.

Chas. G. Laybourn and *F. D. Larrabee*, for respondent.

[1] Reported in 69 N. W. 1103.

COLLINS, J. The plaintiff's intestate, while in defendant's employ as a day switchman in its Minneapolis yard, was killed by a train, and this action was brought, under the statute,[2] to recover damages for such killing.

The yard in question consisted of five parallel tracks, 14 feet apart from center to center, extending in an easterly and westerly direction. The northerly track, extending from the westerly end of the yard in an easterly direction, was a side track used for storage and transfer purposes. The next, on the south, was known as the "mill lead" track, and used for making up strings of cars, and for transferring. South of this was the east-bound passenger track, and south of this was the west-bound passenger track, while on the extreme south was that known as the "Minneapolis Western." Just south of this yard was that of the Chicago, Milwaukee & St. Paul Company, from the tracks of which was a transfer or switching track, which led to and across all of the defendant's tracks, except the one on the extreme north. This track was used exclusively for transferring freight cars from one yard to the other, or from one track to another in defendant's yard; and on the north side of all of defendant's tracks, just about opposite where the switch connected with the Minneapolis Western track, was the usual switch house. The westerly end of the yard was more than 1,500 feet west of the switch house, and a semaphore, with a stationary light, was located at this west end, not far from the switch whereby cars were transferred from the mill lead track to the one, upon the north of it, used for storage and transfer purposes. These tracks were all sunk below the natural surface of the ground, and near the west end of the yard was an overhead iron bridge, upon University avenue, while easterly, a little more than 300 feet, were two overhead bridges of iron, —one on Fourth street, the other on Fifteenth avenue.

The deceased was an experienced man, and at the time of his death had been in defendant's employ as a switchman in this yard for about five years. About half past five in the afternoon on the day in question, one of defendant's switching locomotives, with 21 freight cars and the usual switching crew, came from the direction of the other yard upon the transfer track, and were stopped south of the southerly switch until an east-bound passenger train had

[2] G. S. 1894, § 5913.

passed. Plaintiff's intestate, Moore, then crossed the yard from the switch house, and in succession opened all of the switches on the transfer, so that the locomotive and cars finally reached the mill lead track, and thence proceeded westerly until the locomotive passed the switch connecting the track last mentioned with the one north of it. Here the locomotive was uncoupled from the cars, went upon the track last mentioned, was attached to other cars, and, pulling back upon the mill lead track, proceeded to make up the train with the cars brought from the other yard in the rear. This brought two furniture cars on the rear end, each 13 feet 5 inches high from the top of the rails to the running board,—so high, in fact, that the distance between the running boards and the beams of the overhead bridges, when the cars were passing underneath, was about 3½ feet. It was, of course, impossible for a brakeman to stand on the top of one of these cars and pass under the bridges in safety.

After making up the train, it was backed easterly along the mill lead track,—the furniture cars in front,—to a point east of the switch house, and, soon after it had passed, the lifeless body of Moore was found lying between the rails, a few feet east of the point where the transfer connected with the mill lead track. No one witnessed the casualty, but it was shown that, after Moore switched the locomotive and cars upon the mill lead track, and they had proceeded westerly, he set the switches for through trains, then went to the switch house, procured lights, and set one upon each of the switches on the transfer track. His duty was, then, to walk westerly to the semaphore, light the stationary lamp, and return to the switch house. This he could do without crossing a track. From all of the circumstances which appeared in evidence, it is safe to conclude that, after setting out the light at the switch, where the transfer track connected with the mill lead track, Moore walked westerly towards the semaphore, for some reason stepped upon the track on which the locomotive was backing the cars, was struck by the one in front and knocked down, and that his body was then dragged easterly, along the track, a few feet, to the point where it was found.

It was shown that, at or about the time the locomotive engineer started to back up, under orders from the foreman of the switching

crew, a passenger train passed by upon the east-bound track, running at about 25 miles an hour, and that the locomotive of this train was emitting at this time a large volume of dense, black smoke, which settled under the bridges and upon the ground, from the west end of the yard to a point east of where Moore's body was found. This train was upon its regular schedule time, and, of course, Moore knew that it was then due. The switch locomotive, with any cars which might be attached, ran irregularly, and this must also have been known by him. In an amendment to the complaint, made upon the trial, it was alleged that this smoke was in such quantities as to completely obscure a view of the train, which ran over the deceased soon after it started backward, and so completely filled the excavation in which the tracks were that it "entirely obscured the view of any object in said" excavation. And the evidence justifies the statement that, although it was in the daytime, the settling smoke made it intensely dark under the bridges, and for some distance easterly thereof, after the passenger train passed, and until the smoke lifted from the ground. In fact, while it was usual for the smoke to collect and settle in this locality, it was much more than ordinarily dense on this occasion,—so dense, according to the evidence, as to fully confirm the allegation referred to that the smoke "entirely obscured the view of any object" in the excavation.

Counsel for appellant railway company urges that the evidence wholly failed to show any act of negligence upon the part of his client upon which the verdict can be sustained, and also, that it conclusively established such contributory negligence upon the part of Moore as would preclude recovery. It is to the first of these claims that we shall now address our investigation.

The wrongful acts and omissions on defendant's part, on which plaintiff relied, as stated in plaintiff's complaint, were three in number, and on the trial two of these were necessarily abandoned. The third was that it was usual and customary, in the operation of switching or transfer trains in this yard, to station a brakeman upon the car which was brought in front by the backward movement to give warning of the approach of the backing train, and that in this instance the defendant failed and neglected so to station a brakeman, or to provide any light or signal upon such car, whereby warning

of the approaching train might be given. To these allegations in respect to defendant's acts of negligence was added, on the trial, the act specified in the amendment to the complaint; and the acts relied upon on this appeal can best be stated by a quotation from the brief of one of respondent's counsel as follows:

"My position is that some of the members of said transfer crew were negligent in at least two respects: First, in starting said transfer train eastward over the transfer track without a man being upon the rear car, or head car, as the same was pushed; and, second, in starting the same at the time they did, when the train was entirely obscured from view by the smoke, and its whole passageway to the point where the deceased had a right to be also obscured."

So that we have to consider whether the evidence tended to show that it was negligence to start or move the train on account of the prevailing conditions caused by the smoke, or negligence, under the circumstances, to start or run the train easterly through the yard without having a brakeman stationed upon the leading furniture car. No other acts of negligence, either of omission or commission, are relied upon; and right here we call attention to some matters which affirmatively appeared upon the trial, or are matters necessarily to be inferred from what did appear.

At the time the foreman gave his moving orders, and his train started easterly, the locomotive of the passenger train was about opposite that used for switching, and both were westerly of the bridges. The smoke had not then reached these bridges, and consequently had not settled upon the ground, or affected the opportunity to see or be seen. The dense condition came after the train moved. Conroy, the rear brakeman, was not on the furniture cars when they started, but on a car nearer the locomotive. He testified that, as the train moved, he walked along the top until he came to the first of the two furniture cars, and then stopped, because of the density of the smoke, and because he realized that, while going under the bridges, a man could not stand upon the top of a car of this character. He remained at that point until he could see to proceed, after the smoke lifted a little, and then, satisfied that the bridges had been passed, went on until he reached the forward end of the train as it was then running. This was after the furniture cars had passed the point where Moore's body was found, and, undoubtedly, after he had been stricken down. And evidently it was

as soon as the cars had emerged from the smoke, and about as soon as a brakeman's presence at that particular station upon the train would have been of the slightest service to any person upon the mill lead track.

For convenience, we shall first consider the contention of counsel that the train should not have been started at the time it was, and should not have been moved while the smoke was so dense as to obscure the vision of those in charge, or to prevent other employés engaged about the yard from observing its approach.

When the foreman of the switching crew gave the order to back the train, and when it actually started, the smoke had not settled down, for the locomotive from which it came had not yet reached the bridges. Nor could the foreman anticipate that a greater or denser volume would settle there than was an everyday occurrence. And if he could have foreseen this, upon what hypothesis, or upon what evidence in the case, can it be maintained that it was negligence, either to start the train, or to keep it moving after it had started. Trains belonging to defendant and other companies passed through this yard every few minutes, many at a high rate of speed. There were no grade crossings on which to catch the traveler upon the public ways, and none but employés in the yard itself could be expected to be there; and they assumed the ordinary risks incident to the employment. There was no evidence that it had ever been the custom in this or any other yard to stop the operations of trains when smoke made them invisible, or obscured the vision so that objects upon the tracks could not be seen by the employés. In fact, it would paralyze the business of railroading if trains were to be stopped under such conditions. And this is especially true with reference to this particular yard, where, as we have seen, the smoke settled upon the tracks almost continuously as the trains went by. There was no evidence in the case upon which to base a verdict that there was negligence in starting or moving this train solely because of the atmospheric conditions.

This brings us to a consideration of the contention that defendant was negligent, and the verdict must stand, because no brakeman was stationed upon the front end of the leading furniture car; and this must be passed upon with reference to the plaintiff's positive

allegation, in the amended complaint, conclusively supported by the proofs, and relied upon by plaintiff's counsel, that it was so dark under the bridges and easterly, beyond where Moore's body was found, that the train could not be seen as it moved, nor could any object upon the ground be seen by the operatives of the train, including, of course, a brakeman upon the furniture car, had there been one there.

Although it was emphatically denied on the trial by defendant's witnesses, there was evidence, produced by plaintiff, tending to show that it was the custom, when backing trains in this yard, to have a brakeman upon the leading car; one of his duties being to watch out for pedestrians along the tracks, and to warn them of the danger.

But, assuming this to have been the custom, of what value to Moore would have been a compliance with this custom? Or what service could a brakeman, stationed upon the top of the approaching car, have rendered him as the train backed down through smoke which so completely enveloped every object that all were invisible? The brakeman could not have seen Moore upon the track, and, consequently, could not have warned him of the danger. Although walking towards it, Moore could not, and evidently did not, see the train in time to escape. He had probably stepped over on the mill lead track to avoid the passenger train, and was walking there in the intense darkness. Taking the uncontroverted evidence as to the circumstances and conditions, how can it be said that it was negligence to back the train without stationing a man upon the furniture car to look out for persons on the track, or that the failure to have a brakeman in that place caused Moore's death? A score of men upon the car would have been of no service to him so long as they depended upon their eyesight alone, and nothing but a light sufficiently large to penetrate the gloom, or a noise which would have reached his ears and notified him of the coming train, would have given him an opportunity to escape. The absence of the brakeman from the car, the disregard of the alleged custom, did not operate in any degree to the result. The presence of a brakeman there, and a strict observance of the custom, would not have afforded the slightest protection to the unfortunate man. His death was one of

the distressing casualties which will come to those employed in the extremely hazardous business of yard switching, although every known precaution be taken.

It seems to us that, from the evidence, it conclusively appeared that the failure to observe the custom we have referred to did not contribute to or cause the accident. When it is established, upon the trial of a case, that a custom in regard to the operation of trains, designed for the protection of employés, has been unobserved and disregarded, but it appears conclusively that an observance of the custom would have been of no service or value in the particular case, a verdict for damages cannot be based solely on the failure to observe this custom.

But counsel have urged that, as it was the custom to station a brakeman on the leading car before starting to back, Moore, looking that way, and seeing no one in the usual place, would have the right to presume that the train was not ready, and would not start, and thus he would be justified in stepping upon the mill lead track. This assumes, however, what must forever rest in conjecture,—that Moore did look towards the end of the train, saw it, and saw no one upon it. And again, a brakeman took this position, not as a signal that the train was about to move, but, according to the evidence, to warn people upon the track. Still further, Moore, had he looked, could not assume, because he saw no one at that moment, that the brakeman would not be in place, and the train started immediately afterwards.

As no negligent act was shown which either contributed to or caused Moore's death, the special finding, to the effect that he came to his death through the negligent acts of the foreman and the rear brakeman of the switching crew, was unwarranted, and the general verdict in plaintiff's favor was unsupported by the evidence. The defendant must not only have been negligent, but this negligence must have contributed to or caused the death. This view of the case renders any consideration of the claim that Moore was guilty of contributory negligence unnecessary.

The judgment must be reversed, and, as counsel are agreed that a new trial will be of no avail, judgment will be entered for defendant in the court below upon remittitur.

Judgment reversed.

O. L. GREGG and Others v. JOHN H. FRENCH and Others.[1]

February 3, 1897.

Nos. 10,251—(231).

School District—Award of Funds by County Commissioners.

A division and award of the moneys, funds, and credits of a school district, made by the board of county commissioners under the provisions of the last paragraph of G. S. 1894, § 3674, is governed by the rules applicable to awards made by statutory or common-law arbitrators. Technical precision and definiteness are not required, but there must be no uncertainty as to the intention of the board; and it will not be uncertain where the award sufficiently indicates the means by which the amount thereof may be ascertained, leaving nothing to be done but a ministerial act or an arithmetical calculation.

Same—G. S. 1894, § 3674, not Complied With.

Held, under these rules, that the statute had not been complied with in the purported division and award upon which this action was based.

Action in the district court for Mower county by O. L. Gregg and others, as trustees of School District Number 123 in the county of Mower, against John H. French and others, as trustees of School District Number 23 of said county. A petition for the formation of a new school district to be carved out of districts numbers 22, 23, 24 and 73, having been presented to the board of county commissioners of said county, the board after notice and hearing made an order creating a new district, to be number 123, and also made a division of the moneys, funds and credits of each of the old districts. Afterwards the county auditor served on the treasurer of district number 23 a notice that pursuant to the division and award of the board the amount due district number 123 out of the moneys, funds and credits of school district number 23 was $172.30, and notifying said district to pay said sum into the treasury of Mower county. This action was brought for the recovery of said sum. The case was tried by Whytock, J., who found in favor of plaintiffs. From an order denying a motion for a new trial defendants appealed. Reversed.

[1] Reported in 69 N. W. 1102.

French & Wright, for appellants.

Until a division and award is made by the board of county commissioners in accordance with Laws 1891, c. 73, § 1, the plaintiff cannot maintain this action. School Dist. No. 17 v. School Dist. No. 2, 17 Neb. 177, 22 N. W. 360; State v. Graham, 60 Wis. 395, 19 N. W. 359; District Tp. of Troy v. District Tp. of Doyle, 53 Iowa, 667, 6 N. W. 34. The award quoted in the opinion is not such an award as the statute contemplates, and is so indefinite and uncertain as to be void. The commissioners do not award any sum to the new district. They do not find whether there is any indebtedness. They do not find that any certain sum should be credited to the new district or paid by either of the old districts, or what proportion each of the old districts should pay. The award is to be made by the board of county commissioners as a board, and they are to make such division as they deem just and equitable. This cannot be done by their clerk or by any one member of the board. State v. Kidd, 63 Wis. 337, 23 N. W. 705; School Dist. No. 2 of Multnomah Co. v. Lambert, 28 Or. 209, 42 Pac. 221.

Kingsley & Shepherd, for respondents.

There is nothing in the objection that the award of the commissioners is indefinite and uncertain, for that is certain which may be made certain. The justice and accuracy of the computation of the county auditor is not questioned.

COLLINS, J. In no event could this action be maintained without showing compliance by the board of county commissioners with the provisions of the last paragraph of G. S. 1894, § 3674, which requires that when changing the boundaries of, or when dividing, a school district, such board

"Shall make a division of all moneys, funds and credits belonging to such district, and shall make an award of such moneys, funds and credits to the districts affected by such change; and in making such award the commissioners shall take into consideration the indebtedness, if any, of the district so divided, and shall make such division as they deem just and equitable."

When the board, July 11, 1893, made its order creating the plaintiff district out of territory which had previously been parts of other

districts, it attempted to make a division and award under the statute in the following words:

"After payment in full of the present outstanding indebtedness, if any, of the old districts affected by the said change, then the portion of the moneys, funds, or credits of each of said old districts, paid in by or realized from assessment or levy against such portions or tracts of land as are detached therefrom by said change, and included in said new district, shall be paid by each of said old districts into the treasury of said county, and placed to the credit of said new district. Said division of the funds, moneys, and credits is to be based upon the assessed valuation per acre of the land in each of said tracts so detached, and the per centum or rate of taxation, assessment, or levy by which said portion of said moneys, funds, or credits was raised or realized."

No other division or award was attempted, but subsequently—just when does not appear—the county auditor, ex officio clerk of the board, made a computation, as he testified, and found the amount due from defendant district to plaintiff district at the sum named in the complaint, and for which judgment was ordered herein.

The question is as to the sufficiency or certainty of this award; the clerk ex officio testifying that the computation was made in accordance with the order of award, taking into consideration, for the purpose of ascertaining the amount to be paid by defendant district, the money in defendant's treasury as reported by its clerk to the superintendent of schools in what is known as the "annual report," made at some time between July 31 and August 10, 1893, several days after the award, and purporting to show the financial condition of defendant district at the end of the school year, July 31.

We are of the opinion that the award in this case was not a compliance with the statute. That part of the proceedings had before the board, designated as the "award," must be more definite and certain than the one at bar seems to have been. It is analogous in its essential features to an award made by statutory or common-law arbitrators, and must be equally as plain and specific. There should be no uncertainty as to the intention of the county board; and, while technical precision and definiteness are not required, the award and division should be expressed in such language as will be understood by plain men acquainted with the subject-matter. An award will not be uncertain when it sufficiently indicates the means by which

the amount thereof may be ascertained, upon the principle that that is certain which may be made certain. So, if nothing remains to be done in order to render it certain and final but a mere ministerial act or an arithmetical calculation, it will be good.

Now, let us test the award and division, as made, by the rules above stated. All present outstanding indebtedness was to be taken into consideration, if there was any. Who was to determine the main fact, and then, if there were outstanding debts, the amount thereof? This was not provided for. And after this matter was disposed of, a proportion of the moneys, funds, and credits of each of the partial districts, paid in by or realized from an assessment or levy on the lands included in the new district, was to be paid into the county treasury by the old districts for the use of the new. The division was to be based upon the assessed valuation of the land per acre in each of the tracts constituting the new district, and the per centum of taxation. Was the assessed valuation of the land and the per centum of taxation to be ascertained from a past valuation and assessment, or from one, or more, to be made in the future? Was this to be determined by the board of county commissioners when in session, or by the auditor after the board had adjourned? Was this the final action of the board designated to make the division and award, or was it intended to be nothing more than a basis for subsequent action, to be taken by the board, when the present outstanding indebtedness of each of the old districts, and the amount of moneys, funds, and credits in the treasury of each, should be determined and the valuation of the land per acre, and the per centum rate of taxation ascertained and reported upon. If this was the final order, and the amounts due to the new district were to be computed by the auditor as clerk ex officio of the board, what is there in the order itself to indicate it, or upon what records or documents was the computation to be made?

Excluding from consideration the suggestion that, from the action of the county board upon which plaintiff bases its right to recover, it does not clearly appear that this was regarded as a final award or division, we are certain that the means by which the amount due was to be ascertained are not provided for, and that something besides a mere ministerial act or an arithmetical calculation was

absolutely essential before the amount could be determined on. The intention of the board was not definitely expressed.

Upon remittitur the court below will determine whether a new trial shall be had, or judgment entered for defendant. Order reversed.

GEORGE MITCHELSON v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

February 3, 1897.

Nos. 10,383—(242).

Customs Duties—Entry of Goods—Duties of Carrier.

Plaintiff's agents in the province of Quebec were instructed by him to ship certain merchandise to St. Paul, Minn. Under their direction their clerk made out triplicate invoices, a declaration to be presented to the United States consul, and a consular certificate. The declaration and the certificate contained a statement that it was the intention to enter the goods at the port of Sault Ste. Marie, which port was on defendant's line of road. The invoice contained a statement that they were to be consigned for entry at that port to one Finch, who was defendant's agent at the same place, and also showed that it was in triplicate. The bill of lading specified that goods going to or coming from the United States were subject to customs charges. The invoice, the declaration, the consular certificate, and the bill came into the agent's hands when the goods reached Sault Ste. Marie, and the customhouse officials took possession. *Held*, that defendant's agent was warranted in entering the goods as for "immediate consumption," and in paying the duty fixed by these officials, and that it was not his duty to enter them for "transportation" to St. Paul, another port of entry.

Action in the district court for Ramsey county for recovery of possession of three bales of tobacco. The case was tried before Willis, J., who directed a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

L. T. Storey, for appellant.

Munn, Boyesen & Thygeson, for respondent.

COLLINS, J. S. Davis & Sons, of Montreal, province of Quebec, had in their possession three bales of Havana leaf tobacco, the prop-

[1] Reported in 69 N. W. 1106.

erty of this plaintiff, and from him received orders to ship the same to St. Paul. One of their clerks prepared the necessary invoice and declaration to be presented to the American consul at Montreal in order to obtain a consular certificate. The invoice, made in triplicate, as appeared therefrom, purported to be of three bales of Havana leaf tobacco, to be transported on the Canadian Pacific Railway to the customhouse at Sault Ste. Marie, consigned to R. B. Finch, to be by him entered there, and then transported to St. Paul, consigned to plaintiff. Finch was defendant's agent at Sault Ste. Marie. In the declaration, signed by one of the firm of S. Davis & Sons, was a statement of intention to make entry of the tobacco at Sault Ste. Marie, and in the consular certificate, which was prepared ready for the consul's signature by the same clerk, was a like statement. The goods were then addressed to plaintiff at St. Paul, and delivered to the Canadian Pacific Railway Company, which issued its bill of lading in which was a condition that all goods going to or coming from the United States were subject to customs charges.

The declaration, with the attached invoice, the consular certificate, and the bill of lading, were then forwarded with the goods to Mr. Finch at Sault Ste. Marie, and, with all other merchandise in the same car, passed into the hands of the deputy collector of customs. Mr. Finch then made entry of the goods as "filler tobacco," and as for "immediate consumption," and paid a duty thereon of 35 cents per pound. On examination the authorities classified and declared it to be "wrapper tobacco," and compelled Finch to pay duty at the rate of $1.50 per pound. He then shipped the goods over defendant's railway line to St. Paul. Upon plaintiff's presentation of the bill of lading and tender of the freight charges, defendant demanded payment of the amount advanced at the customhouse for duty, and plaintiff then brought this action.

Sault Ste. Marie is a port at which merchandise may be entered for immediate transportation to other ports of entry, and without payment of duties. 25 Stat. 667. Such entries are pro forma, and involve no ascertainment or liquidation of duties, these questions being reserved for determination at the port of ultimate destination. St. Paul is one of the ports of entry to which merchandise may be transported without prior appraisement or payment. 21 Stat. 173. Had Finch entered this tobacco at Sault Ste. Marie for transporta-

tion to St. Paul, instead of for immediate consumption, all questions as to classification, whether it was "filler," on which the duty was 35 cents per pound, or "wrapper," upon which the duty is $1.50 per pound, and the ascertainment and payment of the amount due as customs charges would have been at the port of St. Paul; and, in case of dissatisfaction at the decision of the collector at St. Paul, plaintiff could have filed a protest, and taken issue, whereupon the matter would have first been decided by general appraisers, and from their determination removed by appeal to the federal courts. As the entry as made was at a port remote from that of St. Paul, the ultimate destination of the merchandise, plaintiff has practically been deprived of an opportunity to protest, and thus to secure a decision by the appraisers or by the courts as to the class in which this tobacco properly belonged.

It is the contention of plaintiff's counsel that it was the duty of defendant's agent, Finch, to enter the tobacco for "transportation" to the port of St. Paul, and that the entry actually made, "for immediate consumption," which necessitated the payment of customs charges, was wholly unauthorized; and for this reason defendant has no lien upon the goods for the amount so paid. If it was the duty of the agent to make the entry in the manner contended for by counsel, and the entry made was a violation or disregard of this duty, the position would seem to be well taken, and the claim for a lien unsustainable.

But we have called attention to the fact that plaintiff's agents at Montreal caused their clerk to make triplicate invoices of the goods in question, and to prepare the declaration to be made to the consul, as well as the consular certificate. In the declaration and in the certificate was a statement of the intention to make entry of this tobacco at the port of Sault Ste. Marie. An invoice, which showed that it was made in triplicate, the declaration, and the consular certificate were attached to the bill of lading, and all passed into the hands of Finch, to whom the goods were consigned for entry, defendant's agent at the port last mentioned. There was express authority to make entry at this port, and no restriction as to the kind of entry,—no instruction that it should be "for transportation" to the port of St. Paul, unless it was to be inferred from the fact that the goods were destined to that place. Probably it might be held,

under such circumstances, that Finch had a discretion in the matter, and might exercise it when executing the agency; and, if he acted in good faith, plaintiff, as his principal, could not complain; but this decision need not be placed upon that ground. Laws U. S. 1890, c. 407, § 2,[2] provides that all invoices of imported merchandise shall be made in triplicate, or, in case the merchandise is intended for immediate transportation without appraisement, shall be made out in quadruplicate. The kind of entry is thus to be determined at the place of shipment, and the invoice made out there. If the invoices are in triplicate, one is preserved by the consul, one forwarded to the collector of customs at the port of entry, and one delivered to the consignor,—in this case, plaintiff's agent at Montreal. If made out in quadruplicate, the consul preserves one, the consignor retains one, one is forwarded to the collector at the port of entry, and one to the collector at the port of destination. The collector at the port of entry is then advised by the invoice as to what kind of an entry is intended to be made, and, if he receives a triplicate, as he did in the case at bar, his only duty is to appraise the goods, fix the amount to be paid as duty, and to retain custody until the amount is paid. In this case Finch received the triplicate invoice sent by Davis & Sons with the bill of lading, and the collector received another. There was no discretion to be exercised by either as to the form of entry, for it had been designated at Montreal, by the persons who, under plaintiff's instructions, shipped the goods to St. Paul. If he had intended an entry for transportation, he should have so advised his representatives in Montreal. For his omission so to do, and for the manner in which the tobacco was invoiced and billed, defendant cannot be held responsible.

The evidence would not have supported a verdict in plaintiff's favor, and therefore the court below was justified in directing a verdict against him. While other points have been made by counsel, we have covered all which require discussion.

Order affirmed.

[2] 26 St. 131.

JUSTIN F. JONES v. NORTHERN TRUST COMPANY.[1]

February 3, 1897.

67 410
75 496

Nos. 10,425—(296).

Money Had and Received—Bill of Particulars.

In an action for money paid by a third party to defendant for plaintiff's use and benefit, and which defendant has refused to pay over on demand, the latter is not entitled to a bill of particulars, as a matter of right, under the provisions of G. S. 1894, § 5246.

Action in the district court for Redwood county for the recovery of $6,000. At the trial the court, Webber, J., granted defendant's motion to dismiss on the ground that plaintiff had failed to establish a cause of action. From an order denying a motion for a new trial plaintiff appealed. Reversed.

John M. Rees, for appellant.

Carman N. Smith, for respondent.

COLLINS, J. The court below, upon the trial of this action, sustained objections made to questions propounded by plaintiff's counsel to his witnesses, and excluded testimony tending to prove plaintiff's cause of action upon the ground that the latter had refused to "furnish a bill of particulars of the amounts alleged to have been converted," a demand for such bill having been made under the provisions of G. S. 1894, § 5246; and the only question is as to the correctness of these rulings. We are clearly of the opinion that the court erred.

Section 5246 first appeared in this jurisdiction as Rev. St. 1851, c. 70, § 74. It was taken bodily from the New York Code,[2] which had been adopted two or three years previously.

It had not then been construed in New York, but in 1874, in Dowdney v. Volkening, 37 N. Y. Super. Ct. 313, it was held that it was to be presumed that the codifiers intended to confine the meaning of the word "account" in the section in question to the class of cases in which it was theretofore most used, as well as most necessary

[1] Reported in 69 N. W. 1108.

[2] 2 Rev. St. (1852) part III., c. IV., pt. 2, c. 5, § 158 (p. 519).

that the particulars of the demand or account should be furnished. The court therefore restricted the use of the word to its mercantile sense, as well as its legal sense, when applied to civil actions, and held that it meant items of work and labor, of goods sold and delivered, and the like, and did not include a bill of particulars of the "damages" set up as a counterclaim in defendant's answer. We do not find that the word as used in the Code has ever been construed by the courts of last resort in the state of New York, but the construction we have mentioned was also given in Barkley v. Railway Co. (1882) 27 Hun, 515, and again in Cunard v. Francklyn (1888) 49 Hun, 233, 1 N. Y. Supp. 877, and this view was evidently taken by this court in Commrs. Mower Co. v. Smith, 22 Minn. 97, in which it was held that in an action for conversion of public funds, brought against a county treasurer, he was not entitled to a bill of particulars under the statute. We are of the opinion that this case is controlled by the decision upon the question in the case just cited.

In the complaint herein it was alleged that a third party had paid money to defendant for plaintiff's use and benefit, which defendant has refused to pay over on demand. In fact, the action was for conversion. Counsel for plaintiff calls attention to a construction of this statute in New York soon after the adoption of the Code, to the effect that whether a party in default shall be precluded from giving evidence of his account depends upon an order previously obtained upon motion. This construction was adopted because of a seeming necessity therefor in order to avoid surprise, upon the trial of an action, to the party claimed to be in default. Gebhard v. Parker, 120 N. Y. 33, 23 N. E. 982. But, whatever merit the rule may have, the practice is well settled here. Advantage of the default is taken upon the trial by objection to proof of the account. Tuttle v. Wilson, 42 Minn. 233, 44 N. W. 10; Henry v. Bruns, 43 Minn. 295, 45 N. W. 444.

Order reversed.

67 412
81 309

PETER SCHUSSLER v. BOARD OF COMMISSIONERS OF HENNEPIN COUNTY.[1]

February 9, 1897.

Nos. 10,229—(203).

Municipal Corporation—Tort of Officer—Ratification.

As a general rule, a municipal corporation is not responsible for the unauthorized and unlawful act of its officers, though done colore officii; but when such corporation itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, it is liable in damages.

Appeal by defendant from a judgment of the district court for Hennepin county, in favor of plaintiff, entered in pursuance of the findings and order of Elliott, J. Affirmed.

A. H. Nunn, Special Attorney for Hennepin County, for appellant.

Lake Minnetonka is a navigable body of water. Minnehaha creek is its outlet. It rises and falls with the waters of the lake and is virtually a part of the lake. The world is charged with notice that the lake is navigable, and that the waters of the creek are waters of that lake. Those buying land upon the lake buy subject to the right of the sovereign to control the waters absolutely within natural high-water mark, regardless of the effect upon riparian owners. Likewise any person buying upon the outlet is charged with notice of its character. Any injury to such riparian owner is an injury of which he cannot complain. Morrill v. St. Anthony F. W. P. Co., 26 Minn. 222, 2 N. W. 842; State v. Minneapolis Mill Co., 26 Minn. 231, 2 N. W. 839; Page v. Mille Lacs L. Co., 53 Minn. 492, 55 N. W. 608, 1119; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139; Falls Mfg. Co. v. Oconto R. Imp. Co., 87 Wis. 134, 58 N. W. 257; Wisconsin R. Imp. Co. v. Manson, 43 Wis. 255; People v. Canal Appraisers, 73 N. Y. 443; Commonwealth v. Boston & M. R. Co., 3 Cush. 53; Treat v. Lord, 42 Me. 552; Fletcher v. Phelps, 28 Vt. 257; Gould, Waters, § 56; South Carolina v. Georgia, 93 U. S. 9. The complaint failed to allege that the construction of the dam was

[1] Reported in 70 N. W. 6.

authorized by law, and the court finds that act was without authority. The county, therefore, is not liable for this act of its officers. Kreger v. Bismark Tp., 59 Minn. 3, 60 N. W. 675; Weltsch v. Town of Stark, 65 Minn. 5, 67 N. W. 648; Board of Commrs. v. Ball, 22 Colo. 125, 43 Pac. 1000; Board of Commrs. of Johnson Co. v. Hemphill, 42 N. E. 760; Town of Crandon v. Forest Co., 91 Wis. 239, 64 N. W. 847.

Young & Fish, for respondent.

The plaintiff was entitled to the natural flow of the stream. Gould, Waters, §§ 204–209, 402; St. Anthony F. W. P. Co. v. Minneapolis, 41 Minn. 270, 43 N. W. 56; Morrill v. St. Anthony F. W. P. Co., 26 Minn. 225, 2 N. W. 842; Pinney v. Luce, 44 Minn. 369, 46 N. W. 561. When an alteration in the natural conditions governing the flow is made by public authority, the same rule applies to the altered conditions. The status thus lawfully substituted becomes, in legal contemplation, the natural status. The dredging done pursuant to Sp. Laws 1873, c. 143, must be presumed to have been authorized for the general good. If it resulted in benefit to the plaintiff's grantors, their right to such benefit became vested, because they were a part of the public and helped to pay the cost. If the volume of the water in the creek was increased to their advantage, they have an unquestionable right to retain that advantage.

A municipal corporation is liable for negligence and for other torts committed by its officers. Towns and counties are liable for the improper exercise of powers which are within the general scope of their duties, but are not liable for mere neglect or failure to perform the duties imposed by law. The reason for the distinction is that the latter are involuntary organizations created by the state for its own purposes, while the former are voluntary organizations. This ground of distinction does not rest on sound principle, but upon the weight of authority. Altnow v. Town of Sibley, 30 Minn. 186, 14 N. W. 877; Snider v. St. Paul, 51 Minn. 466, 472, 53 N. W. 763. Whether a county or town is liable for damages arising from trespass or other active wrong done by its official board colore officii is an open question. Dosdall v. County of Olmsted, 30 Minn. 96, 14 N. W. 458; Gould v. Sub-District, 7 Minn. 145 (203); Bank v. Brainard, 49 Minn. 106, 51 N. W. 814.

The answer of the county is that the dam was built and maintained lawfully. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055; Thayer v. Boston, 19 Pick. 511.

The recovery in this action may rest upon the ground that this dam is a nuisance and that a public corporation has no right to maintain it. Dillon, Mun. Corp. § 374, note; Petersburgh v. Applegarth, 28 Grat. 321; Brayton v. Fall River, 113 Mass. 218; Harper v. Milwaukee, 30 Wis. 365; Franklin Wharf Co. v. Portland, 67 Me. 46; Hannibal v. Richards, 82 Mo. 330; Wood, Nuisance, § 742.

A. H. Nunn, for respondent, in reply.

The cases cited by counsel in support of the proposition that the municipal corporation is liable for the affirmative acts of its officers which are ultra vires are cases against municipal corporations proper, and do not apply to quasi municipalities, such as counties or towns. Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165; Browning v. Board of Commrs., 44 Ind. 11; Rowland v. Gallatin, 75 Mo. 134; Spaulding v. Lowell, 23 Pick. 71; Schumaker v. St. Louis, 3 Mo. App. 297; Cuyler v. Trustees, 12 Wend. 165; Anthony v. Inhabitants, 1 Metc. (Mass.) 284.

BUCK, J. The board of county commissioners of Hennepin county in the year 1893 erected a dam across Minnehaha creek, the natural outlet of Lake Minnetonka, and about 3½ miles below said lake, under the supposed authority of Sp. Laws 1891, c. 381, for the purpose of raising and maintaining a uniform height of water in the lake, in aid of navigation. The plaintiff at the time of the erection of the dam, and for many years prior thereto, owned a piece of land about 3½ miles below this dam, upon which he had erected and used a gristmill operated by the water of this stream; and, to this end, plaintiff had provided the necessary wheels, pond flumes, and raceway power, and, until interfered with by the defendant's erection of the dam, he was enabled to store and use the waters of this stream, by means of said pond and other facilities possessed by him, and whereby said mill was propelled and operated for his use and profit. The defendant erected said dam about five feet in height, and, ever since its erection, has maintained the same, whereby said stream has been obstructed and held back except at times when the stage of

water in Lake Minnetonka is sufficiently high to flow over said dam. The dam so erected and maintained is five inches above the natural bed of the stream, and the sole purpose of defendant in erecting the dam and obstructing the natural flow of the stream was to hold back and retain the water in Lake Minnetonka for the purpose of increasing the volume of water therein, and maintaining a uniform quantity and stage of water in aid of navigation, the lake being an inland, navigable one.

The action is one to recover damages alleged to have been sustained by plaintiff by reason of the construction and maintenance of said dam, and for an injunction restraining and enjoining the defendant from maintaining the same so as to interrupt the natural flow of the water in the stream mentioned. The trial court, among its other findings of fact, also found:

"That the plaintiff, by reason of the construction and maintenance of the dam as above stated by the defendant, and the consequent obstruction of, and interference with, the natural and customary flow of the waters of said Minnehaha creek, has been deprived of the natural use of said waters, and is thereby subject to hindrance and great inconvenience in and about the operation of his said mill, to his damage in the sum of five hundred dollars."

And as conclusions of law:

"(1) That the plaintiff is entitled to judgment herein for the abatement of said dam so erected and maintained by the defendant board, so far as said dam obstructs the natural flow of said stream. (2) For a perpetual injunction ordering and requiring defendant to lower said dam five inches from the top thereof, and for such a width as was the natural width of the original bed of said stream. (3) For the recovery of five hundred dollars as damages, and for the costs and disbursements in this action."

While the plaintiff had no property interest in the water itself, he had an interest in it as it passed along through his land as it was wont to run, and a wrongful and unlawful interference so as to materially interrupt or diminish the natural flow of the stream to plaintiff's damage would constitute a cause of action. The county attorney, representing the defendant, conceded that the acts of the board were unlawful, and that Sp. Laws 1891, c. 381, relating to the improvement of the navigation of Lake Minnetonka, and establishing and maintaining a uniform height of water in said lake, under which they assumed to act, was unconstitutional, and insisted that

such acts were ultra vires, and hence no action against the county could be maintained. Upon this concession of appellant's attorney, and certain allegations in the answer, the question to be determined is the liability of the defendant.

The stream, dam, and property in question are all situated in the county of Hennepin, and whatever was done by the county commissioners was done in pursuance of apparent legislative authority, and under a legislative act in terms conferring the power to act in the manner admitted and proven. Some of these acts were done pursuant to legislative enactments prior to the passage of Sp. Laws 1891, c. 381, but the dam in question was erected subsequent to the passage of that act, and by virtue of its apparent authority; and it is this act which appellant's counsel concedes to have been unconstitutional, and hence he asserts that, the acts of the board of county commissioners being tortious and unauthorized, the defendant is not liable in damages for whatever the members of the board may have done in the premises,—in other words, that Hennepin county had no right to build the dam in question, and therefore the county is not liable for the resultant damages. But this contention is inconsistent with defendant's defense as alleged in its answer. There it expressly affirms the doings of its official board; alleges that its acts were lawful, and that it did no more than it had a legal right to do, in the erection and maintenance of said dam. It not only fails to plead that the acts complained of were ultra vires, but it adopts, assumes, and ratifies the acts complained of, and, by its pleadings, insists that such acts were right, proper, and legal, and also insists that such acts were performed under a public necessity.

This is therefore not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by defendant, and that it was performed within the scope of the board's official duty. It comes into court, and, by its pleadings and evidence, attempts to uphold the wrongs it has done by its officials, and persists in the continuance of this wrong, but, by contention of counsel, insists that it is not liable in damages, because its acts were unconstitutional, unauthorized, and void. Not only this, but it insists upon retaining the benefits of the illegal acts of its officers. It is not willing that the wrong shall cease, but aggressively insists that it will make no reparation for its

past tort, and that it has a legal right to enjoy in the future all of the benefits secured through an unconstitutional law. If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property.

We may concede the general rule to be that the defendant would not be responsible for the unauthorized and unlawful acts of its officer, done colore officii; but when the defendant itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages. The law applicable to a case of this kind is well stated in the case of Thayer v. Boston, 19 Pick. 511, as follows:

"There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by the express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. * * * The court are therefore of opinion that the city of Boston may be liable in an action on the case where acts are done by its authority which would warrant a like action against an individual, * * * or where, after the act has been done, it has been ratified by the corporation, by any similar act of its officers."

We do not pass upon the constitutionality of Sp. Laws 1891, c. 381, relative to the proceeding had by the board of county commissioners, but our opinion in this respect is based upon the concession of appellant's counsel. Points raised by counsel and not discussed in this opinion have been examined and considered, but are deemed immaterial.

Judgment affirmed.

PELICAN RIVER MILLING COMPANY v. MARCUS MAURIN and Others.[1]

February 9, 1897.

Nos. 10,252—(96).

Execution Sale—Injunction—Claims of Third Party.

In an action to enjoin an execution sale of real estate, when it appears from the allegations in the complaint that the plaintiff is in possession of the property, of which he claims to be the legal owner, and, by his admission, that the legal title under which he claims ownership is of record, and claims it to be superior to any that can be acquired by a purchaser at the sale, and the gravamen of the complaint is that, by reason of such threatened sale, insurance has been, and other insurance will be, canceled, a temporary injunction to restrain such sale is properly refused.

Appeal by plaintiff from an order of the district court for Otter Tail county, Baxter, J., denying a motion for a temporary injunction. Affirmed.

Parsons & Brown, for appellant.

Houpt & Baxter, for respondents.

BUCK, J. On July 5, 1895, Marcus Maurin and Peter Maurin, two of these defendants, recovered a judgment against Charles Leistikow and his wife, Augusta Leistikow, in the sum of $1,021.25, upon a prior indebtedness; and thereupon execution was duly issued to the defendant Billings, as sheriff of Otter Tail county, wherein the premises described in the complaint are situate, and upon which premises said sheriff levied said execution, and advertised the same to be sold on February 15, 1896. Previous to the entry of said judgment, Leistikow, who owned said premises, conveyed the same to the plaintiff, the Pelican River Milling Company; and at the time of the entry of said judgment it was in possession of and using said premises as a mill site, and had a gristmill thereon, wherein it was engaged in the manufacture of flour, and upon which premises there was an unpaid mortgage of $15,000, containing a provision that the premises should be kept insured for the benefit of the mortgagee in the sum of $15,000, and in case of default thereof the mortgagee was authorized

[1] Reported in 69 N. W. 1149.

to foreclose said mortgage. After the making of said levy, the insurance company canceled $3,000 insurance upon said mill, by reason of said levy, and plaintiff alleges that the remaining insurance will be speedily canceled unless the defendants are restrained from making said sale of such property. Plaintiff alleges that the levy was unwarranted, and that, if such sale is made, the injury and loss to plaintiff will be serious and irreparable, and that it will be unable to be compensated in damages, and prays for a perpetual injunction restraining the sale of said premises.

The plaintiff, in its complaint, alleges that it is the owner in fee of said premises, and that such title is superior to that of the judgment debtors mentioned in the complaint, who, it alleges, have no title whatever to said premises. It also appears by the admissions of plaintiff that it has the legal record title to said premises. It does not appear that the respondents have committed any act tending to interfere with or disturb the business of the appellant in the use or enjoyment of its property, and being in possession of such property, and claiming title thereto, it is notice to the world of its rights. No fraud is alleged, and it does not appear in what way its title will be clouded by such sale. In fact, the gravamen of the complaint is that a certain insurance company has canceled an insurance policy upon the premises, and other insurance upon the premises will be speedily canceled unless the relief prayed for is granted. We think that the complaint fails to show any ground for the interposition of a court of equity. See Wilcox v. Walker, 94 Mo. 88, 7 S. W. 115.

The order denying the motion for a temporary injunction is therefore affirmed.

W. H. KENT v. CHARLES E. CHAPEL.[1]

67 420
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February 9, 1897.

Nos. 10,313—(253).

Verdict for Tort—Assignment.

G. S. 1894, § 5171, provides that, after a verdict of a jury or report of a referee in any action for a wrong, such action shall not abate by the death of any party. *Held* that, under this statute, a verdict in an action for a wrongful personal injury is assignable. Hunt v. Conrad, 47 Minn. 557, distinguished.

Appeal by defendant from an order of the district court for Ramsey county, Otis, J., denying a motion for a new trial. Affirmed.

Edmund S. Durment, for appellant.

P. J. McLaughlin, for respondent.

BUCK, J. The trial court found as facts in this case that:

"(1) On November 18, 1893, in an action then pending in this court, wherein one Thomas C. Connors was plaintiff and Frank G. Brady was defendant, brought to recover damages for an assault alleged to have been theretofore wrongfully and maliciously made by said Brady upon said Connors, a verdict was duly rendered and given in favor of said plaintiff, Connors, against said defendant, Brady, for $425, which verdict was thereafter, on the same day, for value, duly assigned and transferred to the plaintiff in this action, duly witnessed, and acknowledged; was on said November 18, 1893, duly filed with the clerk of this court, in said action of Connors against Brady; said action, verdict, and assignment being the same action, verdict, and assignment referred to in the complaint herein. (2) On the 12th day of January, 1894, in said action of Connors v. Brady, a judgment on said verdict was duly entered and docketed in this court, in favor of the plaintiff and against the defendant therein, for the sum of $457.05; and thereafter, on April 5, 1894, said Connors made a further formal assignment in writing of said judgment to the plaintiff herein, and the same, duly witnessed and acknowledged, was on the same day duly filed for record in the office of the clerk of this court, in said action."

Afterwards, and on April 11, 1894, execution on said judgment was duly issued to the defendant herein, as sheriff of Ramsey county, and by virtue thereof he collected of said Brady the sum of $463.35,

[1] Reported in 70 N. W. 2.

in full of said judgment, but refused to pay the same over to the plaintiff on demand, on the ground that certain parties had obtained judgments against Connors—one for $32.70, and one for $437.13—prior to the judgment against Brady, and which judgments had been assigned to Brady; that he held executions issued on said judgments against Connors; that by virtue thereof he had on January 27, 1894, duly levied the two executions upon the Connors judgment against Brady; and that he had on April 13, 1894, collected the full amount of said judgment against Connors, and applied the proceeds, amounting to $463.35, to the satisfaction of the two executions against Connors. The sheriff thus entirely ignored the assignment of the Connors judgment against Brady to this plaintiff, Kent, and the latter brought this action to recover the amount of such judgment. The ground for his refusal to pay over to plaintiff the amount of the judgment is alleged to be that the verdict was founded upon a tortious act, and hence not assignable. The trial court held that the verdict was assignable, and defendant brings this appeal.

This is the sole question in issue, except that the defendant challenges the form of the assignment. Upon the latter proposition the trial court found, in substance, that the assignment was broad enough to transfer the cause of action and verdict. The assignment, which was in writing, stated the names of the parties, the amount of the verdict, and the date thereof, correctly, and it purported to assign a judgment, with all of these particulars; and the court found that it was the intention of the parties to assign, by that instrument, the cause of action and verdict. In Freeman on Judgments, § 425, the rule is stated to be that it is no valid objection to an assignment that at the date of its execution no judgment existed.

"The assignment carries the whole title to the subject-matter of the action, and, of course, to the judgment when perfected. As between the parties to the assignment, clearly the whole right passes to the assignee, and the defendant, the moment the judgment is perfected, becomes the debtor of the assignee, and not of the nominal plaintiff."

It is there further stated that every transfer of an assignable cause of action pendente lite has the effect of assigning any judgment subsequently recovered thereon. Upon this point, the judgment ought not to be disturbed.

Was this verdict assignable? In Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, it was held that a right to recover damages for a personal tort was a mere personal right, and not assignable even after verdict, and before judgment. This decision seems to have been based upon what was considered by the court principles of the common-law, and its attention was evidently not called to G. S. 1878, c. 66, § 41, which, in part, reads as follows:

"After a verdict of a jury, decision or finding of a court or report of a referee in any action for a wrong, such action shall not abate by the death of any party."

The legal effect of this statute is not discussed or adverted to in Hunt v. Conrad, and, even if sound in enunciating the common-law doctrine, it is inapplicable to the statute which we have quoted, and which is the same as G. S. 1894, § 5171. In the later case of Cooper v. St. Paul C. R. Co., 55 Minn. 134, 56 N. W. 588, it was held that, where the party dies after the rendition of a verdict in an action brought to recover for personal injuries sustained through the carelessness or negligence of the defendant, the action does not abate, but may be continued by or against the personal representatives of the deceased, under the provision of the statute which we have above quoted. The language used in our statute is substantially that in Wait, Code N. Y. § 121, and it was held under that Code that:

"A claim for damages for a purely personal wrong, while it remains unliquidated and unascertained by a verdict, dies with the person; but the intent of the section of the Code above cited seems to be to prevent that result after the claim has been ascertained by a verdict. In that case the verdict becomes property which passes to the representatives of the deceased, as a judgment would at common law. It becomes the duty of the executor or the administrator to defend it for the benefit of the estate." Wood v. Phillips, 11 Abb. Prac. (N. S.) 1.

In the case at bar the claim for damages became liquidated and determined by the verdict. There was no further uncertainty about the claim, and the statute, by its terms, recognizes and preserves the right of entering judgment upon it. This right is a valuable one, and the verdict should be regarded as a property right,—as much so as a verdict rendered for violation of a contract, or other causes of action not arising out of tort. The verdict was therefore assignable, by virtue of the terms of the statute. This case is distinguishable

from that of Hunt v. Conrad in this: that we construe the right to assign this verdict authorized by the statute, while the statute was not referred to, or its terms construed, in that case, and doubtless was intended to rest upon principles of the common law, and the question of its soundness is not involved in the case at bar.

Order affirmed.

ADOLPH WULFF v. WALTER A. WOOD HARVESTER COMPANY.[1]

February 9, 1897.

Nos. 10,339—(199).

Master and Servant.

Held, that upon the evidence the trial court was justified in dismissing the action and denying the motion for a new trial.

Appeal by plaintiff from an order of the district court for Ramsey county, Egan, J., denying a motion for a new trial. Affirmed.

S. L. Pierce and *B. F. Latta*, for appellant.

Warner, Richardson & Lawrence, for respondent.

BUCK, J. Action to recover damages for personal injuries. At the time of the injury, defendant was engaged in manufacturing agricultural implements at its factory in St. Paul. It is alleged that the injury was caused by reason of the negligence of the defendant in furnishing the plaintiff a defective double-action machine operating a small circular saw. This machine consisted of a table under which was a shaft to which was attached a pulley upon which the belt was thrown when not in use, and a drive pulley to which the belt was transferred when the saw was started and required to be used. The circular saw in use at the time of the accident was so adjusted that it passed through an opening in the table so that the workman could use it instead of a hand saw. This was called the "repairing machine," and all the workmen in the shop had access to it.

[1] Reported in 70 N. W. 156.

The plaintiff, while making doors, needed some wedges to drive the door together, and, for the purpose of getting these wedges, he made a pattern, and then, taking a block or piece of board, went to the machine, fixed the gauge so that he could slip the block between the saw and the gauge, and, holding the pattern in the right hand and the block in the left, he pressed down on the saw with the block so as to make the saw start and move towards him. As he pressed the block upon the saw, it started, struck the block, drew his hand on the saw, and, before he could withdraw it, it cut off four of his fingers.

At three or four different times within two weeks preceding the date of this injury, plaintiff had operated this machine, and was shown how to do so by one of the workmen in defendant's employment, to whom the foreman of the factory had sent him for that purpose. This workman showed him that by taking a stick, and touching the point of the saw teeth with it, and pressing down lightly, the saw would start readily. This was the usual way of starting the saw by the workmen who used it for short jobs, and some of them used it for an hour or more at a time. No accident or injury had occurred before from this method of using it, and the workmen did not regard its use in this manner as dangerous.

The plaintiff, at the time of the injury, was 43 years old. His father, residing in Prussia, was a carriage maker and proprietor of a factory, employing four or five men; and, from the age of 15 to 18 years, the plaintiff had worked in his father's factory, in which was a band saw which he was accustomed to work and see worked by others. At the age of 18 he went to Berlin, and worked for four years in the factory of the kaiser, where 15,000 men were employed, and where circular and other kinds of saws were used, and which he saw running, but did not use them himself. About 16 years ago he came to this country, and has worked more or less at his trade, as a carpenter, up to the time of the injury. We have not stated all, but the more salient, facts bearing upon his knowledge of the machinery of this kind, its use, and its dangers, and we are led irresistibly to the conclusion that the plaintiff was injured by his own contributory negligence. He was neither young, nor a novice in his knowledge of the use of machinery of this kind and its attendant dangers.

There was an easy and obvious way of applying a stick to the saw, without danger of the hand being drawn down in contact with the saw when it started. The accident must have resulted either from plaintiff's applying the block to the saw in a negligent manner, or from his voluntary assumption of obvious danger, and in either case he cannot recover. The block or board which he held was a small one,—only four to six inches wide and about five inches long,—and easily cut or displaced by a revolving circular saw. It was not the manner in which he was required, or which was necessary, to hold the block to make the wedges, that caused the injury, nor was it the customary way in which they were sawed, but the block was used for an entirely different purpose, viz. to start the saw. Had he used a stick, as directed, or not pressed so hard upon the block, the injury would have been avoided. If he had kept his hand out of the line of the saw when pressing upon the block, no accident would have occurred. Or even if he had used the block in a careful manner in starting the saw, his hand would not have been caught. While employers who use dangerous machinery should be held to a strict accountability in case of their negligence, the employé must at least use ordinary care in avoiding obvious dangers.

The trial court was justified, upon the plaintiff's own evidence, in dismissing the action, and the motion for a new trial was therefore properly denied.

Order affirmed.

FIRST NATIONAL BANK OF BROOKLYN v. K. O. SLETTE and Another.[1]

February 9, 1897.

Nos. 10,347—(270).

Nonnegotiable Instrument.

An instrument in these words:

"$1,673. Halstad, Minn., July 26th, 1894.

"For value received, we promise to pay to the order of the John Good Cordage & Machine Company the sum of sixteen hundred and seventy-three dollars as follows: Payable by New York or Chicago exchange.

[1] Reported in 69 N. W. 1148.

$560, Nov. 15th, 1894; $560, Dec. 1st, 1894; $560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid."—*Held* not negotiable, for it is not payable in money, but by bills of exchange.

Action in the district court for Norman county on a promissory note alleged to have been made by defendants and by the payee before maturity indorsed to plaintiff for a valuable consideration. The answer alleged that the note was given in payment of the price of goods sold by the payee and that there was a breach of warranty and failure of consideration. The court, Ives, J., directed a verdict in favor of plaintiff, and from an order denying a motion for a new trial defendants appealed. Reversed.

Carmody & Leslie and *F. H. Peterson*, for appellants.

A note to be negotiable must be an absolute promise for the payment of money. The note in question is not an absolute promise for the payment of money, being payable by New York or Chicago exchange. The holder would not be obliged to accept the amount due on the note in money, if tendered it at maturity of the note. If the tender were in a draft on New York or Chicago for the amount payable, a refusal to accept the tender could be pleaded in a subsequent action on the note. Johns v. Fales, 4 Mass. 245; Irvine v. Lowry, 14 Pet. 293; Daniel, Neg. Inst. §§ 55, 56. See Hastings v. Thompson, 54 Minn. 184, 55 N. W. 968; Hegeler v. Comstock, 1 S. Dak. 138, 45 N. W. 331.

Calkins & Sharpe, for respondent.

As to the effect upon the negotiability of a note when exchange is added, see Whittle v. Hide & L. Nat. Bank, 7 Tex. Civ. App. 616, 26 S. W. 1106; Second Nat. Bank v. Basuier, 12 C. C. A. 517, 65 Fed. 58; cases cited in Hastings v. Thompson, supra; Pardee v. Fish, 60 N. Y. 265; Keith v. Jones, 9 John. 120; Judah v. Harris, 19 John. 144; Leiber v. Goodrich, 5 Cow. 186; Thompson v. Sloan, 23 Wend. 77; Merrill v. Hurley, 6 S. Dak. 592, 62 N. W. 958; Smith v. Crane, 33 Minn. 144, 22 N. W. 633; Towne v. Rice, 122 Mass. 67; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559; Hope v. Barker, 43 Mo. App. 632; Russell v. Klink, 53 Mich. 161, 18 N. W. 627; Christian Co. Bank v. Goode, 44 Mo. App. 129.

START, C. J. This action is based upon an obligation, which is substantially in these words:

"$1,673. Halstad, Minn., July 26th, 1894.

"For value received, we promise to pay to the order of the John Good Cordage & Machine Company the sum of sixteen hundred and seventy-three dollars, as follows: Payable by New York or Chicago exchange. $560, Nov. 15th, 1894; $560, Dec. 1st, 1894; $560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid."

The only question on this appeal is whether this is a negotiable instrument under the law merchant. It is absolutely essential, in order to constitute a promissory note under the law merchant, that the promise be to pay in money. If this instrument can be construed as an absolute promise to pay in money $1,673, with exchange, it is negotiable; otherwise, not. Hastings v. Thompson, 54 Minn. 184, 55 N. W. 968.

The case of Bradley v. Lill, 4 Biss. 473, Fed. Cas. No. 1,783, is the only one to which our attention has been called, where the language of the instrument was similar to the one under consideration. In the case referred to the note was made in Chicago, and was payable at New York, "in" exchange; and it was held that the note was negotiable, upon the ground that the promise was to pay the sum named in the note, "with" exchange, which was a mere incident to the debt.

In the case at bar the note is not payable at any particular place, and the promise is, not to pay a given number of dollars in money "with"—that is, plus—the current rate of exchange, but it is to pay the sum named in the note by New York or Chicago exchange. The holder of this instrument cannot demand in payment thereof $1,673 in money, plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago. Nor can the maker tender in payment $1,673 in money, with the cost of exchange; for his promise is to make payment by inland bills, which he must purchase in the market. The instrument, then, is not payable in money, and is, therefore, not a promissory note, within the law merchant. Easton v. Hyde, 13 Minn. 83 (90); Jones v. Fales, 4 Mass. 245; Irvine v. Lowry, 14 Pet. 293; 1 Daniel, Neg. Inst. §§ 55, 56; Tied. Com. Paper, § 29; 1 Rand. Com. Paper, § 90. In reaching this conclusion we have not been un-

mindful of the fact that, in commercial usage, bills of exchange are regarded as substitutes for money; but this usage cannot make them such.

Order reversed, and a new trial granted.

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PETER SHARPE v. B. B. LARSON.[1]

February 9. 1897.

Nos. 10.348—(271).

Libel Per Se—Proof of Malice.

A certain publication made by the defendant of and concerning the plaintiff as an attorney at law and county attorney, set forth in the opinion herein, considered, and *held*, that it is obviously libelous per se, and that the trial court rightly instructed the jury that the plaintiff was entitled to a verdict in some amount without proof of malice.

Appeal by defendant from an order of the district court for Norman county, Ives, J., denying a motion for a new trial. Affirmed.

That part of the article preceding the libel was as follows:

"More Legal Discussion."

"In the Halstad Reporter of Feb. 6 appears an article signed by N. T. Moen, which I think no more than right to answer. Moen says that after a jury of 12 men had taken their solemn oaths to do justice they talk about more cheek than a government mule. How can you be so stubborn, Mr. Moen? Was you not at the trial? Don't you remember the juryman, Martin Brown, who under solemn oath said that he had been on the first jury; knew all about the case and had formed an opinion which could not be removed by evidence; that he could not and would not decide the case impartially, and when I, as defendant, who according to law was entitled to a fair and impartial hearing, kindly asked to have said juryman dismissed you frankly objected. And that man Friday from Hendrum, whom you had been hunting for one solid week, while court was open all the time, sustained your objection. Why did you not allow me a fair trial, Mr. Moen? You say: Why do we establish courts of justice? Why was it that four of the jurymen, who had been on the first jury, and who was so closely connected with the last case, should be on the other case? Why should you have to use the same jury when you had the whole township and

[1] Reported in 70 N. W. 1, 554.

village to select a jury from? Mr. Houske was on both juries, and he explained it like this: That in the first case he dismissed Berg because he had not had much experience as a juryman and would not go against the majority, and in the second case he thought that when Berg was dismissed some one had to be guilty. The man went so far as to say that if he had not been on the first jury he should have found me not guilty. He must have gained experience very quickly. He did not look much at the majority this time. Brown and he hung the jury for twelve hours and then did not give up. Don't you think, Mr. Moen, that an explanation from Mr. Houske would have sounded more reasonable if he had said just about like this: 'I have promised Moen, Furuseth & Co. that if I get on the jury I will agree to find Mr. Larson guilty regardless of the evidence.' * * * I will tell you that if you should ever get any experience in law, you will often find that a jury does not decide a case strictly according to law. Now, after this jury agreed two to ten in my favor, you sent Mr. Berg, who had favored you in every point, over to me to ask if I was willing to leave it to him. I said I would not leave it to him, but was willing to leave it to J. W. Johnson, a man who is known all over the country to be one of the most honest and straight men. But no; rather than leave it with a justice that cannot be bribed in open court, you would drop it without trying it at all. Mr. Moen refers us to a case of over one year ago where he was the complaining witness. He also refers us to Judge Furuseth's docket, and speaks of Mrs. Ford, the only disinterested witness in the case. But why did you summon Nels Helgeland and John Sulerud? or what side did they favor as long as you cannot count them with the disinterested. I have always told Mr. Moen that he knew very little law, and much less common sense. I have often said that if I say anything I can give a reason for same or take it back, and I hope right here that I can give a reason for what I have said to Moen. I remember well that I was arrested by Mr. Moen, as he said and brought before Judge Furuseth. Moen asked for an adjournment in order to get disinterested witnesses, and I suggested that we should go ahead and have a test case. If we both told the truth we would not need any witnesses, and this Moen excepted to, but he did not testify the same way. We had some witnesses who corroborated me, but that was not disinterested witnesses. The judge then told Mr. Moen that there was not enough evidence to hold me. Moen accordingly summoned the good, solid, honest and disinterested witnesses, and among them was this model Mrs. N. D. Ford. But remarkable enough, Moen and I have disagreed so many times. but in regard to the witnesses we agreed to the dot. I think Mrs. Ford was an honest, disinterested witness and told the truth every word she said. But right here is where Moen shows his small common sense, when he refers to Mrs. Ford and Furuseth's docket, which I will refer to as well as Moen. Mrs. Ford corroborated me with every word she said, except one place, and that was where Moen asked me how long time it was from the time I ordered him out till I laid hands on him to move him out. I think I said half a minute, but I also said that I ordered him out two or three times. The

first time I spoke in a common voice, but when it appeared to me that he was somewhat deaf I spoke louder the last time. Mrs. Ford said that it was about two seconds from the time she heard that I ordered him out till I laid hands on him, and Moen said it was no time at all. It also appeared that Mrs. Ford had not paid any attention to our conversation until I spoke in a louder voice than common. Not one of all the rest of the witnesses materially changed my evidence at all, and will challenge Moen, Furuseth & Co. with the docket or anything else. I have often had disputes with Moen when the questions could be decided, and in order to get some satisfaction out of him I have offered to bet him, but he says I always tried to bluff him with money when I know he has none, but now in order to give Moen fair play I will invite him out on a wheelbarrow ride. Now, if Moen can show by the docket or any other way that I lied in that case or any other case, I will be the horse, and if not we'll reverse the matter. And if I cannot prove that Moen lied I will be the horse. The case went on and the judge was very careful to enter on his docket all the proceedings. The evidence of all these disinterested witnesses were just the same as mine, with the exception of Mrs. Ford, in the time between two seconds and half a minute; that is, if I did not order Moen out more than once. I understood that I had no show in Furuseth's court. I did take advantage of a technical law point, and moved to dismiss the action on the ground that I was not offered a jury. This was quite a surprise to them, but the judge was a little quicker to think, and explained it such that I was smart enough to ask for a jury if I wanted one, but I gave them to understand that the law was such that a defendant should be offered a jury, which the judge seemed to believe. But at once the judge took a second thought and claimed that they had offered me a jury. Finally Attorney Moen got encouraged, jumped up and said, 'I object, because we offered him a jury.' I then very kindly asked them what I answered when they offered me a jury. The attorney and the judge both answered at once, and said that I did not answer. Then I was compelled to produce a book that Moen hates very much,—a book written by Arctander, which said that unless I plainly refused a jury I should have one. Then the judge could find no more excuse at once, but found that I was guilty and fined me $10 and costs. I did not kick in the fine, but the judge took pains to express himself about the very small fine he gave me. I could not see the reason for such a small fine. But in examining his docket I found his verdict, as near as I can remember, as follows: 'This court finds probable cause to believe that this defendant is guilty. I will therefore predict him to pay the fine of $10 and costs.' This explained the reason for the small fine. The judge had conscience enough, that should he have decided wrong, the fine would be light. The case was appealed and the proper bond given. Judge Furuseth voluntarily offered to make out notice of appeal. The judge at once went into his office to make out the notice, but shortly came back with a paper in his hand, and asked me if I wanted the appeal on the question of law alone, or law and fact. I told him law and fact. Furuseth told me several times afterwards that he was very

glad that I appealed the question of law and fact so that it could be found out whether he was right in his decision or not, to be sure that everything was all right."

[Here followed the libel quoted in the opinion.]

"B. B. Larson."

Carmody & Leslie and *M. A. Brattland*, for appellant.

Calkins & Sharpe, for respondent.

START, C. J. Action for a libel. The defendant admitted the publication here in question, and the trial court instructed the jury that it was libelous per se, and that the jury must return a verdict for the plaintiff for damages in some amount. Verdict for $500, and the defendant appealed from an order denying his motion for a new trial.

Practically the only question for our decision is whether the publication was a libel per se. The plaintiff was, during all the times stated in the pleadings, an attorney at law, and county attorney of the county of Norman from January 1, 1894, to January 1, 1895, during which time the defendant was convicted of an assault and battery, on the complaint of N. T. Moen in justice court. He attempted to appeal to the district court, and caused to be served on the plaintiff as such county attorney a notice of appeal. On the plaintiff's motion as county attorney the appeal was dismissed in the district court for the reason that the notice did not state the grounds of the appeal. Afterwards, and after the plaintiff ceased to be county attorney, and on March 12, 1896, the defendant, in reply to a previous publication by Moen relating to the prosecution of the defendant, published in a local newspaper a lengthy article which reflected upon Moen and the justice, and in which he also published of and concerning the plaintiff these words:

"Once, when I was in Ada, I stepped in to the county attorney, and asked him if he had received notice of appeal in my case, and he said, 'Yes,' and Moen was not sure that Judge Ives would hold me on probable cause, so he went to Ada, and persuaded the county attorney to claim that he never received notice of appeal, and the result was that the appeal was dismissed, and I had to pay the fine, and Moen claims he got satisfactory revenge."

A publication which imputes to one holding an office improper conduct therein, or to an attorney at law professional misconduct,

is libelous per se. It is not necessary that the person libeled should at the time of the publication still hold the office. Odgers, Sland. & L. 26; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, and 20 N. W. 87. If the publication is obviously defamatory, it is the duty of the trial judge, in a civil action, to direct the jury, as a matter of law, that it is a libel per se, and that they must find for the plaintiff. Smith v. Stewart, 41 Minn. 7, 42 N. W. 595. The defendant in such a case cannot be heard to say that he did not intend by the publication to injure the plaintiff. But, where the publication is reasonably susceptible of a defamatory meaning, as well as an innocent one, according to the occasion and circumstances of the publication, the question whether it is libelous is one for the jury. Pratt v. Pioneer Press Co., 30 Minn. 41, 14 N. W. 62; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387.

The publication here in question falls within the first class, and is obviously defamatory. It is not reasonably susceptible of an innocent meaning, and is a libel per se. It charges the defendant with both professional and official misconduct, in that, contrary to the truth and his duty, he permitted himself to be persuaded to claim in court that he had never received the notice of appeal, whereby the appeal was dismissed, and the defendant unjustly compelled to pay a fine. The charge implies that the plaintiff, as an attorney and officer, by dishonest means and by a false statement of fact to the court, procured the dismissal of the appeal at the instigation of another, who was thereby enabled to claim that "he got satisfactory revenge." Such a charge necessarily tends to diminish public confidence in the plaintiff's official and professional integrity.

The defendant, however, claims that the publication was privileged. There was no evidence in the case tending to show it to be such. The publication was made after the plaintiff had ceased to be county attorney, and at a time when he was not a candidate for any public office. It was not made to any court or officer authorized to inquire into the matter, or in the discharge of any duty, public or private. It was not reasonably necessary for the protection of any interest of the defendant, or for his own vindication. The publication being a libel per se, and not privileged, it follows that the trial court did not err in refusing to direct a verdict in favor of the defendant, or in instructing the jury that the plaintiff was entitled to a verdict for some damages without proof of malice.

The defendant's objections to the questions put to him on cross-examination were rightly overruled, for the questions were proper as a part of the cross-examination, and as tending to show his motive for the publication.

The defendant's last assignment of error is to the effect that the court erred in denying his motion for a new trial. This is insufficient to enable the defendant to raise here the question that the damages awarded are excessive, as the motion for a new trial was based upon three separate grounds, one of which was that the damages were excessive. Hence we cannot consider this question.

Order affirmed.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion. The publication containing the alleged libel is a long, rambling article, in which defendant airs his grievances against Moen. The county attorney is nowhere alluded to, except incidentally in the paragraph quoted in the majority opinion. It is hard to get a clear idea of the situation without reading the whole article. The defendant is evidently a foreigner, whose use and understanding of the English language is not very good; and, being a layman, we cannot hold as a question of law that he has any very definite knowledge of the exact method of procedure in taking appeals in justice's court in criminal cases. Taking the whole article together, it does not clearly appear that he intended to charge that the county attorney acted in bad faith and willfully denied the truth in claiming that he had never received notice of appeal. In the crude manner in which defendant expresses himself, his language is susceptible of meaning merely that the county attorney was imposed upon by Moen, and did not intend to act deceitfully. In my opinion, defendant's meaning was a question for the jury.

EDWARD BURAU v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 9, 1897.

Nos. 10,349—(256).

Accident at Crossing—Contributory Negligence.

Evidence considered, and *held*, that the trial court was justified in ordering judgment for the defendant notwithstanding the verdict, for the reason that it conclusively shows that the deceased, for whose killing by the defendant's railway train at a highway crossing this action was brought, was guilty of contributory negligence.

Appeal by plaintiff from a judgment of the district court for Clay county in favor of defendant, entered in pursuance of the order of Searle, J. Affirmed.

F. D. Larrabee, for appellant.

The court cannot say, as a matter of law, that the deceased was guilty of contributory negligence. Nettersheim v. Chicago, M. & St. P. R. Co., 58 Minn. 10, 59 N. W. 632; Struck v. Chicago, M. & St. P. R. Co., 58 Minn. 298, 59 N. W. 1022; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Boyer v. St. Paul C. R. Co., 54 Minn. 127, 55 N. W. 825; Tuthill v. Northern Pac. R. Co., 50 Minn. 113, 52 N. W. 384; Hendrickson v. Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044; Beanstrom v. Northern Pac. R. Co., 46 Minn. 193, 48 N. W. 778; Loucks v. Chicago, M. & St. P. R. Co., 31 Minn. 526, 18 N. W. 651; Hutchinson v. St. Paul, M. & M. R. Co., 32 Minn. 398, 21 N. W. 212; Shaber v. St. Paul, M. & M. R. Co., 28 Minn. 103, 9 N. W. 575; Kelly v. St. Paul, M. & M. R. Co., 29 Minn. 1, 11 N. W. 67; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Schum v. Pennsylvania R. Co., 107 Pa. St. 8; Kellogg v. New York Central & H. R. R. Co., 79 N. Y. 72; Pittsburgh, C., C. & St. L. R. Co. v. Burton, 139 Ind. 357, 37 N. E. 150.

C. Wellington, for respondent.

START, C. J. About midnight of December 22, 1895, the plaintiff's intestate, while driving, in an open buggy drawn by a pair of

[1] Reported in 69 N. W. 1149.

horses, along a public highway which crosses the defendant's railway tracks near Carlisle in this state, was struck and killed by one of the defendant's passenger trains, and this action was brought to recover damages for his death. Verdict for the plaintiff for $5,000, but the trial court, on motion of the defendant, ordered judgment for it, notwithstanding the verdict, pursuant to Laws 1895, c. 320, upon the ground that it conclusively appeared from the undisputed evidence that the deceased was guilty of contributory negligence. Judgment was so entered, from which the plaintiff appealed.

The evidence would sustain a finding that the defendant was negligent in not giving any signal of the approach of the train to the highway crossing, and the only question here for review is whether the undisputed evidence so clearly establishes the contributory negligence of the deceased as to justify the trial court in so holding as a matter of law. The evidence in this case justifies no other conclusion than that the deceased might have avoided the collision by the exercise of ordinary care. He was familiar with this railway crossing, having driven over it a number of times. Westerly from, and commencing near, the crossing, was a cut 6 feet in depth in the deepest part thereof. The center of the headlight of the locomotive drawing the train in question was 10 feet 1⅞ inches from the top of the rail, and the diameter of the headlight was 22½ inches. The headlight and the lights from the car windows of the train could be seen, when passing through the cut, at any point along the highway, by a person seated in a buggy, for a distance of 132 feet southerly from the crossing, the direction whence the deceased was approaching the crossing, at the time of the accident. These facts are established by undisputed evidence which seems to be entirely trustworthy. The deceased knew the location, and that he was approaching a place of danger; and it is obvious that, if he had been careful and vigilant in looking out for the approaching train, he must have discovered it in time to have avoided it.

Judgment affirmed.

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ANNIE S. CARLSON v. PRESBYTERIAN BOARD OF RELIEF.[1]

February 9, 1897.

Nos. 10,381—(250).

Pleading.

Held, following Pinney v. Fridley, 9 Minn. 23 (34), that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad.

Mortgage—Insurance.

A mortgagee, holding a fire policy providing that the loss, if any, should be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage, and bid in the premises at the sale for the full amount of his debt. Afterwards, but before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale. *Held*, that the mortgagor could not recover of the mortgagee the amount so paid, but, if he had redeemed, he would have been entitled to have had the amount applied pro tanto on the redemption.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., sustaining a demurrer to the complaint. Affirmed.

H. J. Fletcher and *Savage & Purdy*, for appellant.

The purchase of the mortgaged premises at the foreclosure sale by the defendant for the full amount due paid the debt and satisfied the mortgage. Sargeant v. Ruble, 33 Minn. 354, 23 N. W. 535; American B. & L. Assn. v. Waleen, 52 Minn. 23, 53 N. W. 867; American B. & L. Assn. v. Stoneman, 53 Minn. 212, 54 N. W. 1115; Tinkcom v. Lewis, 21 Minn. 132; Berthold v. Holcomb, 12 Minn. 221 (335); Steele v. Bond, 28 Minn. 267, 9 N. W. 772. After the foreclosure sale the defendant was no longer a mortgagee. The dictum in Loy v. Home Ins. Co., 24 Minn. 315, has been overruled by the later cases cited above. The defendant was simply a purchaser. Whitney v. Huntington, 34 Minn. 458, 26 N. W. 631; Stone v. Bassett, 4 Minn.

[1] Reported in 70 N. W. 3.

215 (298); Lawton v. St. Paul P. L. Co., 56 Minn. 353, 57 N. W. 1061.

Carlson had insured the property, and his right to the insurance was restricted only by the provision making the loss payable to defendant "as mortgagee, as its interest may appear." Ermentrout v. American F. Ins. Co., 60 Minn. 418, 62 N. W. 543. The year of redemption from the foreclosure sale not having expired Carlson still had an insurable interest in the property. Loy v. Home Ins. Co., 24 Minn. 315; Strong v. Manufacturers' Ins. Co., 10 Pick. 40; Cone v. Niagara F. Ins. Co., 60 N. Y. 619. Carlson, therefore, had a right to the insurance money due on the policy, which belonged to him exclusively as between the parties to this action. Therefore, if defendant collects the loss from the insurance company, it holds the sum so collected in trust for the insured. 1 Jones, Mort. §§ 409, 417; King v. State M. F. L. Co., 7 Cush. 1, 6; Graves v. Hampden F. Ins. Co., 10 Allen, 281; Buffalo S. E. Works v. Sun M. Ins. Co., 17 N. Y. 401, 407; Waring v. Loder, 53 N. Y. 581, 585; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442; Billings v. German Ins. Co., 34 Neb. 502, 508, 52 N. W. 397; Callahan v. Linthicum, 43 Md. 97, 103; Hammel v. Queen Ins. Co., 50 Wis. 240, 244, 6 N. W. 805; Chamberlain v. New Hampshire F. Ins. Co., 55 N. H. 249, 262.

C. S. Jelley and *Stephen H. Somsen*, for respondent.

The purchaser at a foreclosure sale has, during the year for redemption, the rights of the mortgagee before foreclosure. Donnelly v. Simonton, 7 Minn. 110 (167); Daniels v. Smith, 4 Minn. 117 (172); Horton v. Maffitt, 14 Minn. 216 (289); Loy v. Home Ins. Co., 24 Minn. 315; G. S. 1894, § 4502; National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509.

START, C. J. This is an appeal by the plaintiff from an order sustaining a general demurrer to her complaint. The material allegations thereof are: The plaintiff's assignor, John Carlson, gave a mortgage to the defendant on a lot in Minneapolis, with a dwelling house thereon, to secure a debt of $6,000, and, at his own expense, procured and delivered to the defendant a policy of fire insurance on the dwelling house. The policy was issued in the name of the mortgagor, but the loss, if any, was payable by the terms of the policy to the defendant, as mortgagee, as its interest might appear. The

mortgage was afterwards foreclosed, and the defendant purchased the lot at the foreclosure sale for the full amount of the mortgage debt and costs. After this sale, and before the expiration of the year of redemption, the house was injured by fire to the extent of $1,865, and the mortgagor repaired the whole damage to the house by fire at his own expense, with the knowledge and consent, and at the request, of the defendant. After this loss by fire the defendant collected and received from the insurance company, on account of the policy and the loss sustained by John Carlson by reason of the fire, the sum of $1,865, which sum the insurance company paid to the defendant for the use and benefit of John Carlson. No redemption was made from the foreclosure sale, and the mortgagor assigned any and all right he had in the money so paid to the defendant to the plaintiff, who brought this action to recover the amount thereof.

The plaintiff claims that her complaint states simply a common-law action of assumpsit for money had and received, and that the allegation that the insurance company paid to the defendant the amount due under the policy for the use and benefit of the mortgagor states a cause of action; that this general allegation is not modified or controlled by the special facts alleged in the complaint, which are claimed to be simply explanatory. The complaint cannot be construed so as to eliminate all the special facts alleged, upon which the general allegation that the defendant received the money for the use and benefit of the mortgagor depends. It is a rule of pleading that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad. Pinney v. Fridley, 9 Minn. 23 (34); First Nat. Bank v. St. Croix Boom Co., 41 Minn. 141, 42 N. W. 861.

Construing all of the allegations of the complaint in harmony with this rule, the question is, do they show a legal right in the defendant to the insurance money? We answer the question in the affirmative. The repair by the mortgagor of the damage to the house by fire, at the request of the plaintiff, is not connected with the payment of the money to the defendant by any of the allegations of the complaint. If it were the agreement between the parties that in consideration of such repair the insurance money should be paid to the mortgagor, we should have a different question to deal with;

but there is no allegation of such agreement, and the law will not imply it from such request. Whether the law would imply from such request to the mortgagor to repair his own property a promise by the mortgagee to pay the reasonable value of such repairs, we need not decide or discuss, for the plaintiff's cause of action is not based upon any such supposed implied contract.

This allegation as to the request to repair may be eliminated, and we have simply the question whether the defendant, as mortgagee, after the foreclosure of its mortgage, and the sale of the premises in payment of its debt and costs, was entitled to the insurance money paid to it by the insurance company on account of injury by fire to the house on the mortgaged premises after the sale, and before the expiration of the time for redemption.

It must be conceded, as claimed by the plaintiff, that if a third party had purchased the lot at the foreclosure sale for a sum equal to the defendant's debt and costs, and there had been no assignment of the interest of the defendant in the policy to the purchaser, the money paid on the policy to the defendant would belong to the mortgagor, because the defendant in such case would have no interest in the property destroyed. Ermentrout v. American F. I. Co., 60 Minn. 418, 62 N. W. 543. If the mortgagee is the purchaser at the foreclosure sale, his debt, as between him and the mortgagor, is paid; but it is not true that either his mortgage, as a muniment of title, or his interest in the mortgaged premises, is discharged or extinguished. Where the mortgagee is the purchaser at the foreclosure sale, he simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have a lien on the premises for the amount of the purchase price, which was applied in payment of his debt. His interest in the premises is practically the same after the sale as before, except the purchase price must be repaid to him by the mortgagor, with interest, within the year, or his title under his mortgage becomes absolute. Until the time to redeem expires, he has a lien on the premises, and holds them for the security of his bid. Donnelly v. Simonton, 7 Minn. 110 (167); Horton v. Maffitt, 14 Minn. 216 (289).

The plaintiff, relying upon some general statements in former decisions of this court to the effect that, where the mortgagee is the purchaser at the foreclosure sale, he stands in the precise condition

of a third party purchasing at such sale, and that his debt and mortgage are extinguished to the extent of his bid, claims that the defendant in this case, when it bid in the premises for the full amount of its debt, ceased to be a mortgagee, and had no longer any rights as such in the insurance policy.

The statements referred to are correct, in the connection in which they were used; but they afford no support for the proposition of the plaintiff that, by the purchase of the premises at the foreclosure sale, the defendant ceased to have any further interest in the insurance policy, because the defendant technically had ceased to be a mortgagee. The defendant after the foreclosure had the same interest in the dwelling house insured as before, and it still held the insurance policy, which insured, not its debt, but its interest in the house mortgaged. It is wholly immaterial whether the defendant, after the foreclosure, was technically a purchaser, and not a mortgagee, and that its lien and claim on and to the house secured its bid, and not its debt; for it continued to have an insurable interest in the house, by virtue of its mortgage, precisely as it had before the foreclosure. It was this interest that was insured by the policy payable in case of loss to the defendant as its interest might appear, and, a loss having occurred while the policy was in force and the interest still in existence, the insurance money was rightly paid to the defendant, subject to the equity of the mortgagor to have the amount thereof applied pro tanto in redemption of the premises.

Order affirmed.

JOHN B. McHUGH v. CITY OF ST. PAUL.[1]

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February 9, 1897.

Nos. 10,397—(170).

City—Accident to Traveler.

A city is not ordinarily liable for an injury to a traveler while straying outside of an unfenced street, when the whole street is safe and convenient to travel upon.

Same—Lighting Streets.

A city is under no obligation to light its streets, where they are safe and convenient for travel the whole width, unless the duty to do so is imposed by its charter.

Appeal by plaintiff from an order of the district court for Ramsey county, Egan, J., denying a motion for a new trial. Affirmed.

Geo. C. Lambert, for appellant.

E. J. Darragh, for respondent.

BUCK, J. On March 22, 1895, and for many months prior thereto, Burgess street was a common thoroughfare in the limits of the city of St. Paul, upon which street, at the time of the injury complained of, the plaintiff was a resident. This street had been graded several years, and in places there was a filling of earth about 11 feet deep across a marsh, and it was at a point upon this filling or embankment where the accident occurred. The street was 60 feet wide, 34 feet between the gutters, which were 3 feet wide and 7 inches deep, and the ground leveled off 10 feet outside of the gutter for a sidewalk. The slope from the outer edge of the sidewalk to the bottom of the embankment, and down to the marsh, was 1 foot vertically to 1½ feet laterally.

The plaintiff was a mail clerk, and also owned a grocery store in St. Paul, and on his way home he would occasionally stop at the house of one Mrs. McCusick, residing on the right-hand side of Burgess street, and get orders on his grocery store from her. On the night of the accident, March 22, 1895, the plaintiff was on his way

[1] Reported in 70 N. W. 5.

home, driving along this street, and intended to stop at Mrs. McCusick's, and obtain an order from her for such groceries as she might want the next day, when his horse turned towards the house, as he supposed, and, stopping near the edge of the street, was, with the wagon and plaintiff, precipitated down the embankment, and plaintiff personally injured, and for this injury he brings this action. Upon the trial, and at the close of the evidence, the court dismissed the action, and plaintiff appeals.

The grounds of negligence alleged are (1) that the defendant city had neglected to build a fence or railing along the edge of this street, to prevent the traveling public from falling into the marsh; (2) that defendant neglected to furnish lights to enable travelers to avoid this dangerous place. There was no claim made that the street was improperly or unskillfully graded, or that the embankment was not properly constructed.

Plaintiff was perfectly familiar with the street and neighborhood, with the location of the house, and that it was near, or, as he testified, alongside of, the marsh. One of two things quite conclusively appears, viz. that he allowed his horse to go to the place of the accident unguided, or else that he drove the horse there himself. The undisputed evidence showed, by the wagon tracks, that, when nearly opposite the place of accident, his horse turned nearly at right angles with the highway, and in so doing, if he was in the traveled part of the road, he must have passed over the gutter, three feet wide, and the sidewalk, ten feet wide, before reaching the edge of the street, from which point he was precipitated down the embankment. There was no snow in the street, but some snow and mud in the gutter; but the stones in the gutter could be readily seen by daylight. Evidently he supposed that he was nearly opposite the house of Mrs. McCusick, his place of destination; but, in driving, or permitting his horse to turn, from the main track too soon, and allowing him to go too far, the accident occurred only a few feet from Mrs. McCusick's house.

The plaintiff's familiarity with the street, the McCusick house, and the embankment, and the manner in which the horse was managed, were important factors in the case, all of which were admitted; and all the facts appearing show conclusively that plaintiff was guilty of negligence in his conduct, resulting in being precipitated down the embankment, and which caused the injury. If he saw fit, on a

dark night, as this was, to encounter the risk of going with his horse and wagon to Mrs. McCusick's house, and thus pass beyond the limits of a properly and skillfully graded street, without any latent or patent defects in it, and the injuries received were beyond the line of such street, we do not think the city liable.

This court has already held, in the case of Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271, that a city is under no obligation to light its streets, and a mere neglect to do so is not a ground of liability, unless the charter expressly imposes the duty. This is the general rule, and, if there are exceptions, the facts herein do not bring this case within the exception. Nor are towns necessarily bound to fence, or erect barriers, to prevent travelers from getting outside of the road or way. 2 Dillon, Mun. Corp. (4th Ed.) § 1005. The reason for the rule is well stated, in cases of this kind, in Sparhawk v. City of Salem, 1 Allen, 30, as follows:

"It appears that the highway in question was safe and convenient for travelers throughout its entire width, and the land adjoining it was also safe and convenient to travel upon. After getting entirely outside the highway in safety, the traveler must proceed still further in order to reach a dangerous place. If he reached that place, and was injured, the want of a railing was remotely, and not immediately, connected with the injury. If cities and towns are bound to protect travelers against such dangers, by erecting railings to prevent them from straying out of the highway, it is difficult to see the limit of their liability. In passing over an unfenced plain in the nighttime, the traveler might stray away from the road to a great distance, at the risk of the town, unless they fenced in their whole highway. Or he might, by mistake, enter a private way, or an open space, such as is often left about a farmhouse, or a large public common, or an unfenced forest, and hold the town responsible for any injury he might receive there, because they had not fenced against the private way, or open space, or common, or forest. Indeed, they would be liable to him for any injury he might receive from coming in collision with any building or structure in the city by straying beyond the limits of a street in the dark, unless they provided railings along all their public streets."

Considering the fact that Burgess street, in its entire width of 60 feet, was graded, and in good condition; that plaintiff was well acquainted with the neighborhood; that he turned his horse purposely, or allowed him to turn, at right angles with the street, and had to pass over the gutter and sidewalk before reaching the embankment, —and all the other attending circumstances, we are of the opinion

that the trial court was fully justified in directing a verdict for the defendant, and denying the motion for a new trial.

Order affirmed.

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GEORGE W. WILSON and Another v. LILLIE J. WILSON.[1]

February 11, 1897.

Nos. 10,261—(204).

Divorce—Alimony—Aggregate Allowance.

Under G. S. 1894, § 4807, the aggregate award and allowance made to the wife from the estate of her husband in actions for divorce cannot in any case exceed in present value the one-third part of the personal estate of the husband and the value of her dower in his real estate; and, in estimating the value of this estate, the husband's income from professional services cannot be considered.

Appeal by plaintiffs from a judgment of the district court for Nobles county in favor of defendant, entered in pursuance of the findings and order of P. E. Brown, J. Modified.

L. S. Nelson, *C. M. Crandall*, and *George W. Wilson & Son*, for appellants.

Adler C. Clauson, for respondent.

BUCK, J. On January 2, 1895, George W. Wilson, one of the plaintiffs, brought an action against his wife, the defendant Lillie J. Wilson, for divorce, upon the ground of willful desertion. The wife answered, denying desertion of her husband, and in her answer also alleged various statutory grounds for divorce as against her husband, and she also asked affirmative relief in this: that she be granted a divorce from her husband, and that she be allowed alimony and a share of her husband's property. The answer also charged the plaintiff with having conveyed a large amount of his property to Edwin C. Wilson, his son by a former marriage, and that he had also furnished the consideration for a large amount of property standing in Edwin C. Wilson's name, but which was colorable and apparent,

[1] Reported in 70 N. W. 154.

and not in fact his property, and that the same was held for the use and benefit of her husband, and that such transactions were done for the purpose of defrauding this defendant, both as a creditor and as the wife of George W. Wilson. The plaintiff Edwin C. Wilson, after the service of the answer, was made a party to the action. The cause was tried in three sections, viz.: (1) As to who was entitled to a divorce; (2) as to dealing between the parties; (3) as to the amount of alimony, if any, which should be awarded to the defendant, and what amount, if any, of defendant's money, should be restored to her as due from George W. Wilson, and what sum per month should be allowed defendant for the support of two minor children, issue of said marriage.

It appeared that the parties were residents of Nobles county, in this state; that plaintiff was 50 years old; that defendant was 35 years old; that they were married on April 24, 1875; that the issue of said marriage was Irma Wilson, born November 8, 1878, and Blanche Wilson, born July 20, 1880. Edwin C. Wilson, a son of George W. Wilson by a previous marriage, was 24 years old at the time of the trial of this action.

Upon the trial of the first section of the case, without a jury, the court found that plaintiff was not entitled to a decree of divorce, and plaintiff George W. Wilson then conceded that defendant was entitled to a decree of divorce against him, upon the ground of desertion. A jury was then impaneled to try the second section of the case, and, after trial had, the jury returned a verdict that George W. Wilson has received moneys of the defendant amounting to $2,800, and that he had paid her all except a note of $312.60, and there had been paid upon said note $360, including interest. After trial of the third section of the case, the court, in its findings of fact, adopted the verdict of the jury as its own, and found other facts, and ordered a decree of divorce on behalf of defendant, with certain other relief, which will be subsequently referred to in this opinion.

The note of $312.60, referred to by the jury, was dated December 10, 1879, made in the state of Kansas, and upon its face does not purport to draw interest; but plaintiff, in his reply, alleges that it was to draw interest from its date, at the rate of 12 per cent. per annum. It did not appear what was the legal rate of interest in the state of Kansas at the time of making said note, and, upon the evi-

dence of payments and the time of making the same, the trial court found that there was still due from the plaintiff George W. Wilson to the defendant, for moneys belonging to her, and intrusted to him by her since their marriage, and before the bringing of this action, the sum of $286.99. The evidence upon this matter is not of such character as to justify us in holding that it was error for the trial court so to find, and we refuse to disturb its finding upon this point.

Other findings of fact by the trial court are as follows:

"(6) The plaintiff George W. Wilson was at the time of the bringing of this action, and at the time of its trial, and is now, the owner of the following described tracts of land, with others: Lots 20, 21, and 22 in block 18 in the village of Worthington, in said county and state, the legal title to which is in George W. Wilson. Lots 9, 10, 11, 12, 13, and 14 in block 2 in Butler's addition to the village of Ellsworth, in said county and state. An undivided one-half interest in the northwest quarter of section 14, town 105, range 38, and an undivided one-half interest in the northeast quarter of section 24, said town and range, both in Cottonwood county, said state. Lots 16 and 17 in block 18 in the said village of Worthington. The west half of the southeast quarter of section 10, town 103, range 40, said Nobles county. The legal title to all said tracts of land above described other than said lots 20, 21, and 22 is in said plaintiff Edwin C. Wilson, in trust for said George W. Wilson, the equitable title being in George W. Wilson; and said Edwin C. Wilson has no interest in the same whatever, as against this defendant, except as a naked trustee for said George W. Wilson. An equitable interest in lots 10 and 11 and an alley and a half, all in block 14, in said village of Worthington, the legal title to which tract is in the Minnesota Loan and Investment Company, and the equitable title in said Edwin C. Wilson; and said equitable title is held by said Edwin C. Wilson in trust for said George W. Wilson, in the same manner as the tract next hereinabove described, and, as against the defendant, said Edwin C. Wilson has no interest in the same. (7) Said George W. Wilson was at the time of the bringing of this action, at the time of its trial, the owner of property, real and personal, of the value of $7,722. (8) This defendant has no property, real, personal, or mixed, and is in ill health, and has been for many years last past. (9) The plaintiff George W. Wilson is an attorney at law, engaged in active practice, and has now, and for more than three years last past has had, an average annual income of upward of twenty-five hundred dollars per annum, over and above all expenses, except his and his family's personal expenses and living."

Conclusions of law:

"The defendant is entitled to judgment in this action that the bonds of matrimony heretofore existing between herself and plaintiff

George W. Wilson be dissolved to the same extent as if the same had never existed, and awarding to her the sole care, custody, and control of Irma and Blanche Wilson, the infant children of the parties; also, that she have judgment against said plaintiff George W. Wilson for the sum of $286.99, and the further sum of $75, both above mentioned; also, that she have judgment against the plaintiff George W. Wilson for the sum of $2,000, awarded her as alimony, out of his estate, the same to be payable in four instalments of five hundred dollars each, the first of said instalments to be payable on January 1, 1897, and the others on the first day of each succeeding January until paid, all to bear interest at seven per cent. per annum, provided that the same may be all paid at any time at the plaintiff George W. Wilson's option, said judgment for said two thousand dollars to be a specific lien on said lots 20, 21, and 22 in block 18 in the village of Worthington, in said county and state; also, that the plaintiff George W. Wilson pay to the defendant the further sum of three hundred and sixty dollars per annum, in instalments, one hundred and eighty dollars thereof payable on the first day of May and December of the present year, and of each year hereafter, which said sums are awarded defendant for her support and maintenance."

The plaintiffs challenge the sixth and seventh findings of fact by the trial court, upon the ground that they are unsupported by the evidence. The evidence is quite voluminous upon these matters, and we do not feel bound to insert in this opinion an analytical detailed statement of the testimony, which, in our opinion, fully sustains the finding of the court below. We have carefully perused all the evidence bearing upon the questions involved, and we fail to see how any other conclusion could have been reasonably formed than that of the trial court. This view of the case applies to all the questions of fact affecting either or both of the plaintiffs.

The most serious question relates to the amount of $360 per annum allowed by the trial court to defendant for her support, payable in semiannual instalments, indefinitely. The allowance of the $2,000 was clearly justified by the findings of the court and under the terms of the statute. In fact, the amount was considerably less than could have been legally allowed. George W. Wilson, at the time of the commencement of this action, and at the time of the trial, owned real and personal property of the value of $7,722; and, under the provisions of the statute, one-third of this amount should have been allowed defendant, and this could have been made payable in one entire sum, or in instalments, as was done by the trial court.

The court, however, evidently relying upon its power to make a further allowance to the wife, based upon the $2,500, annual income of the husband, awarded to her the sum of $360 per annum, payable semiannually, for an indefinite period, as above stated. We find no authority in the statute which sustains this award or allowance. It was not intended by the court to be allowed as to any part of the real or personal estate of the husband. The $2,000 was expressly awarded as alimony out of the husband's estate, but it is not stated out of what estate the $360 was to be taken, and we infer that it was to be taken from the husband's annual income. By G. S. 1894, § 4807, the court is authorized in every divorce for any cause, except adultery committed by the wife, to award and decree to the wife such alimony out of the estate of the husband as it may deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case, and may, by its decree, make the same a specific lien upon any specific parcel of real estate of the husband.

"But the aggregate award and allowance made to the wife from the estate of her husband, under the provisions of this section, shall not in any case exceed in present value the one-third part of the personal estate of the husband and the value of her dower in his real estate."

The limitation thus imposed by the statute seems to be mandatory, and its controlling effect is to restrain the court from awarding to the wife any more than one-third in present value of the husband's real and personal estate. There is some plausibility and much equity in the contention that where the husband has no real or personal estate, but has a large income from professional services or otherwise, he should not be permitted to live in luxury, and the wife permitted to starve, especially where he is the guilty party in compelling her to seek a divorce. But redress in this respect rests with the legislature, and not with the court. The legislature has, in terms, fixed the status of the rights of parties to divorce suits and the incidental rights as to property in such cases; and, as we find no authority permitting an allowance to the wife beyond that mentioned in the statute above referred to, the judgment of the court below must be modified, and the award of the sum of $360 disallowed.

The trial court will therefore modify the judgment therein rendered in this case, by striking therefrom the provision allowing the

defendant the sum of $360, payable in semiannual instalments. In all other respects the judgment is affirmed. No statutory costs allowed the appellants.

P. N. PETERSON v. EMIL KREUGER.[1]

February 15, 1897.

Nos. 10,370—(283).

Forcible Entry and Detainer—Defense—Nonpayment of Rent.

That a landlord has violated a covenant in his lease to keep the demised premises in good repair, and that thereby damages have resulted to the tenant, is no defense in an action brought by the former, under the forcible entry and detainer act (G. S. 1894, § 6118), to have restitution of the premises for nonpayment of rent.

Appeal by plaintiff from an order of the municipal court of Stillwater, Jack, J., denying a motion for a new trial. Reversed.

J. N. Searles, for appellant.

The provisions of G. S. 1894, c. 66, relating to counterclaims that may be interposed in a civil action, have no reference to proceedings under the forcible entry and detainer act. Phillips v. Port Townsend, 8 Wash. 529, 36 Pac. 476; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760; Warburton v. Doble, 38 Cal. 619; Kelly v. Teague, 63 Cal. 68; McSloy v. Ryan, 27 Mich. 110; Abrams v. Watson, 59 Ala. 524; People v. Walton, 2 Thomp. & C. 533; Borden v. Sackett, 113 Mass. 214.

J. N. Castle, for respondent.

If a tenant is evicted from a part of the leased premises by the wrongful act of the landlord, he is discharged from the payment of rent. Christopher v. Austin, 11 N. Y. 216; Smith v. Stigleman, 58 Ill. 141; Tunis v. Grandy, 22 Grat. 109, 130; Royce v. Guggenheim, 106 Mass. 201. As to what constitutes an eviction, and when it is a defense, see Wright v. Lattin, 38 Ill. 293; Halligan v. Wade, 21 Ill.

[1] Reported in 70 N. W. 567.

470; Leadbeater v. Roth, 25 Ill. 587; Tyler v. Disbrow, 40 Mich. 415; Jackson v. Eddy, 12 Houck (Mo.) 209, 212; Alger v. Kennedy, 49 Vt. 109.

COLLINS, J. Action by plaintiff, under the provisions of G. S. 1894, § 6118 (the forcible entry and detainer act), to have restitution of certain real property leased by him to defendant Kreuger for hotel purposes, upon the ground that the latter had neglected and refused to pay rent in accordance with the terms of the lease. The only defense made by Kreuger was that he had been partially evicted by plaintiff, by reason of the latter's failure to repair the roof of the hotel building, whereby some of the rooms had become unfit for use, causing a loss of custom and patronage exceeding in amount the sum due as rent when the action was brought. The plaintiff's counsel attempted, by timely objections, to exclude all testimony bearing upon this defense, but the trial court overruled the objections, and finally submitted for a determination by the jury the amount of damages sustained by defendant by reason of the partial eviction; the verdict being that the damages equaled the amount due as rent, and that defendant was not guilty of an unlawful detainer. Even if it should be conceded that there was a breach on the part of the landlord (plaintiff) of a covenant to repair the roof, express or implied, the court erred in permitting defendant to introduce evidence to support his so-called defense or counterclaim, for in this form of action it was all irrelevant and inadmissible. If fully proven, it constituted no defense to plaintiff's right of action.

A tenant against whom an action is brought under this statute is not permitted to counterclaim for damages arising from a breach of any covenant in the lease which is independent of the covenant to pay rent. He cannot justify an unlawful detainer by alleging a violation of a covenant to repair prior to the commencement of the proceedings. Van Every v. Ogg, 59 Cal. 563; Phillips v. Port Townsend Lodge, 8 Wash. 529, 36 Pac. 476, and cases cited; Borden v. Sackett, 113 Mass. 214; Finney v. Cist, 34 Mo. 303. There is no difference of opinion upon this question. All of the cases cited to the contrary by defendants' counsel simply bear upon the right of a tenant to counterclaim for damages in an action brought to recover rent.

The object of the statute is to provide an adequate and summary remedy for obtaining possession of leased premises withheld by tenants in violation of the covenants of their leases, and, as said in one of the cases we have cited, "this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law." [2] That this is the only permissible view to be taken of the statute is made plain by an inquiry as to what would have been the form of the verdict (see forms prescribed, G. S. 1894, § 6127) if the jury had assessed the defendant's damages at any sum less than the amount admittedly due as rent when the action was instituted. Would the finding have been "Guilty," or "Not guilty"? What would have been the conclusion of the jury as to plaintiff's right to have restitution, under such circumstances? Would restitution have been awarded, or would the finding have been that defendant could not be evicted? These questions suggest what complications might arise if the ruling made by the court below should be upheld.

The order denying plaintiff's motion for a new trial is reversed.

CHARLES H. ERMENTRAUT and Another v. PROVIDENCE-WASHINGTON INSURANCE COMPANY.[1]

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February 15, 1897.

Nos. 10,375—(267).

Trial—Withdrawing Special Questions from Jury.

A jury was directed in addition to returning a general verdict, to answer certain specific questions submitted to them. An affirmative answer to both of these questions was absolutely necessary in order to sustain a general verdict in plaintiffs' favor. After being out 36 hours, without reaching an agreement as to the answers to the specific questions, the court, of its own motion, and in the absence of defendant's attorneys, withdrew these special questions from further consideration by the jury, and then received a general verdict against the defendant. *Held*, that the court erred in withdrawing these questions.

[2] Phillips v. Port Townsend, 8 Wash. 533, 36 Pac. 478.

[1] Reported in 70 N. W. 572.

Appeal by defendant from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $525. Reversed.

McDonald & Fauntleroy and *Freeman P. Lane*, for appellant.

Merrick & Merrick, for respondents.

COLLINS, J. This is one of a series of cases brought by plaintiffs against different insurance companies to recover the amounts alleged to be due upon fire policies covering plaintiffs' elevator building. Several of these cases have been before this court, but this is the first to reach us in which there has been a verdict upon the merits. In view of the fact that the testimony covers more than 650 pages of the paper book, it is to be regretted that the order denying defendant's motion for a new trial must be reversed.

Plaintiffs' elevator adjoined a feed mill owned by another party. It was plaintiffs' claim on the trial that a fire originated in the feed mill, and so burned and weakened the wall between it and the elevator as to cause the latter to fall; while defendant contended that the elevator fell because improperly constructed, not by reason of any fire, and that there was no fire in either mill or elevator until both buildings had fallen. The vital issue presented by the evidence was upon this point, and the court charged the jury in the following words:

"So that, if you should find from the evidence in this case that the fall of this elevator was caused by the fire, and you should find that the fire existed in the feed mill adjoining, and that by reason thereof the elevator was caused to fall, then the plaintiff would be entitled to recover. On the other hand, if you should find from the evidence in the case that the fire was the result of the fall, or, in other words, that the fire was caused or occasioned by the fall, and there was no fire until after the fall, then there could be no recovery in this case, because the policy contains a provision that if the building, or any part thereof, fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease. So that, under that provision, they could have no recovery at all for fire that occurred by reason of the fall of the building."

The court instructed the jury to return a general verdict, and also, at the request of both parties, submitted two specific questions to be answered. The first:

"Was there any fire in or on Thompson's feed mill [the feed mill mentioned in the evidence] before the elevator building [mentioned in the evidence] fell?"

The second of these questions was:

"If you answer the foregoing question 'No,' you will not consider the following question; but, if you should answer it 'Yes,' then you will answer the following question: Did such fire cause said elevator to fall in?"

The record as to what transpired subsequently is as follows:

"The court, after the jury had been out considering this case for a day and a half, withdrew, upon its own motion, the two foregoing special questions, which had been submitted to said jury to answer, in the absence of the attorneys for the defendant, and allowed the jury to bring in a general verdict, and without answering either the two said special questions which had been submitted to them."

Under the circumstances appearing in this case, we are obliged to hold that the court erred when it withdrew the special questions, and permitted the jury to return a general verdict. The instruction had been to the effect that, unless an affirmative answer was returned to both questions, the general verdict must be for defendant; and, after deliberating for 36 hours, an affirmative answer had not been given to either question. Evidently no agreement as to the time when the fire broke out, with reference to the falling of the buildings, had resulted from earnest discussion of the evidence. The questions were then withdrawn, and the effect of the withdrawal may well be imagined. It might have been regarded by the jury as equivalent to an instruction that the court had receded from its former position as to the law, or that, notwithstanding the difference of opinion on the principal issue, a general verdict might be returned for plaintiff. It was equivalent to an instruction that the verdict just mentioned might be found even if the jury should fail to agree upon the specific questions.

In Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68, 43 N. W. 783, it was stated that when the jury find a general verdict in favor of the plaintiff, but fail to agree upon a specific question submitted to them, the general verdict is properly received, unless a finding in favor of the defendant on the specific question submitted would be conclusive against plaintiff's right to recover. In the case at bar, a finding in

the negative upon the specific questions submitted would have been conclusive against plaintiffs' right to recover; and on principle we fail to see any difference between a case of that character where, after many hours of deliberation, the jury fails to agree upon the specific question, it is withdrawn, and a general verdict for plaintiff is returned, and the case where the jury returns a general verdict in favor of the plaintiff, but are unable to agree upon a specific question submitted to them, although a finding thereon in defendant's favor would have been conclusive against plaintiff's right of recovery.

The plaintiffs' position upon this point is that, as it was discretionary with the court to submit the special questions, it had the implied power to withdraw them whenever it was deemed advisable. This view of the present case cannot be taken, for the logic of it is that when the court exercises its discretion, and calls upon the jury to answer a specific question going to the very gist of the cause of action and to plaintiff's right to recover, and then discovers that an answer cannot be agreed upon, it may smooth the way, and induce a general verdict in his favor, by removing the obstacle which has theretofore absolutely prevented it.

Order reversed.

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HIRAM C. TRUESDALE v. FARMERS' LOAN & TRUST COMPANY and Others.[1]

February 15, 1897.

Nos. 10,409—(247).

Res Judicata.

An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact, and deciding a point actually litigated, is an adjudication binding upon the parties, and conclusive upon the point passed upon.

Fee of Counsel—Action to Recover.

In proceedings to foreclose a trust deed covering certain railway property, a trustee named in another deed (a prior lien) was made a party defendant. It appeared by counsel, who attended to its rights and protected

[1] Reported in 70 N. W. 568.

its interests to the end of this litigation. Upon a petition made by its counsel, which set out in detail the nature and value of all services rendered by them in connection with the litigation, the court, when rendering its final decree in the foreclosure proceedings, made an allowance out of the trust funds for the services rendered by counsel, said allowance being made, after a full hearing upon the merits, at less than the amount claimed. Later, counsel procured an order directing the receiver to pay over the amount so allowed to the petitioner or to its counsel. The money was then paid to the plaintiff in this action, one of the counsel. The court then set apart out of the trust funds a sum of money sufficient to pay certain interest due upon bond coupons held by the parties whose interests counsel had represented in the litigation, and also directed that this money be placed in the custody of defendant the Minneapolis Trust Company. The plaintiff then commenced this suit in equity to recover judgment for a balance alleged to be due for legal services, and for money expended in and about the litigation, and to impress a lien for the amount of said judgment upon the money still in the custody of the trust company. *Held*, that this money is a part of the trust funds, and, applying by analogy the rule as to motions before stated to the order of the court allowing fees in the original litigation, that the present action cannot be maintained.

Same—Allowance.

Held, further, that the present action does not come within the exception or proviso in the order directing the receiver to pay over the amount of the allowance, to the effect that such payment shall not preclude the petitioner or its counsel from recovering compensation for services from the parties or persons represented by them.

Appeal by Philadelphia Trust, Safe-Deposit and Insurance Company and other defendants from an order of the district court for Hennepin county, Jamison, J., denying a motion for a new trial. Reversed.

C. D. & Thos. D. O'Brien, for appellants.

J. B. Atwater, *Jas. W. Lawrence*, *Keith*, *Evans*, *Thompson & Fairchild*, and *Davis*, *Kellogg & Severance*, for respondents.

COLLINS, J. Prior to the year 1888, the Minneapolis & St. Louis Railway Company executed and issued its bonds to the amount of $1,100,000, secured by its trust deed, to the defendant the Farmers' Loan & Trust Company. The bonds were negotiable, passing from hand to hand, and some of them are now owned by the defendants in this action who have taken this appeal. In 1888 certain litigation was instituted by Henry Seibert against the railroad company, in which it was sought to force a foreclosure of the trust deed or mortgage above

mentioned. The Farmers' Loan & Trust Company was made a defendant in that action, and appeared through its attorneys, Messrs. Turner, McClure & Rolston, of New York City, and the plaintiff H. C. Truesdale. The court refused to order a foreclosure of the mortgage held by the trust company, but did decree a foreclosure of certain other subsequent mortgages, under which the property was sold. That action was before this court on several occasions. Seibert v. Minneapolis & St. L. R. Co., 52 Minn. 246, 53 N. W. 1151; 58 Minn. 39, 59 N. W. 822; 58 Minn. 53, 59 N. W. 879; 58 Minn. 58, 57 N. W. 1068; 58 Minn. 65, 59 N. W. 826; 58 Minn. 69, 59 N. W. 829; 58 Minn. 72, 59 N. W. 828.

In the Seibert suit the court found the amount to which the trust company and its attorneys were entitled, as compensation for their services in that litigation, to be $20,000, making an order for payment, of the import hereinafter stated, and this amount was paid. The bonds held by the appellants ran for 40 years. At the time the interest coupons payable in July, 1893, became due, the plaintiff in this action, Mr. Truesdale, instituted an action at law against the holders of the bonds personally, the parties to that action being the same as the original parties to this action, excepting that the Minneapolis Trust Company and the Farmers' Loan & Trust Company were not made defendants in the first action. The defendants prevailed in the action, and on an appeal to this court an order denying a new trial was affirmed, and judgment was duly entered in favor of the defendants. Truesdale v. Philadelphia T., S. D., & I. Co., 63 Minn. 49, 65 N. W. 133. Prior to the entry of judgment, the garnishee asked to be allowed to deposit the money in his hands into court; and an order was made depositing the money with the Minneapolis Trust Company, one of the defendants of this action, in whose custody it still is, and against the paying out of which a temporary injunction has been issued herein.

Immediately after the entry of judgment in the Truesdale case, and about December, 1895, the plaintiff brought this suit upon the same cause of action against the same defendants, with the exceptions we have mentioned, in equity, however, and asked that he be given judgment for the amount due him on account of his services and expenses, and that said judgment be declared a lien upon the funds in the possession of the Minneapolis Trust Company, and be paid therefrom, and if sufficient funds be not found in the hands of the Minneapolis Trust Company, that the Farmers' Loan & Trust Company be directed to

proceed forthwith to collect from the bondholders the sum remaining due plaintiff. The defendants who take this appeal appeared and answered, as did also the Minneapolis Trust Company and the Farmers' Loan & Trust Company. The trust companies, however, took no further part in the defense than to see that no liability attached to them. On December 14, 1895, after the commencement of this action, the plaintiff, pursuant to the insolvent laws of the state of Minnesota, made a general assignment for the benefit of his creditors, to Cavour S. Langdon. When the case came on for trial, this fact being suggested to the court, an order was made allowing the assignee and also Messrs. Turner, McClure & Rolston, Mr. Truesdale's associate counsel in the Seibert litigation, to file intervening complaints, the order further providing that the action should proceed in the name of the plaintiff, any recovery which might be had to be paid as the court might afterwards provide.

The decision in the first action brought by this plaintiff was placed upon the ground that, as the trustee named in the trust deed had employed plaintiff to render the services without stipulating it should not incur any personal liability, and without professing or undertaking to create a lien on the trust estate for the value of such services, and, further, that, as the trustee was not insolvent, plaintiff could not recover of the beneficiaries of the trust estate, but must look to the trustee for compensation. In this case, brought to enforce an equitable lien upon the trust funds, the court found that during the progress of the Seibert case the court made an order directing that the receiver pay to plaintiff, on account of his services, the sum of $5,000, which was paid; and that, at the time of the findings of fact and conclusions of law in that case, there was allowed to the attorneys of the trustee the further sum of $15,000, out of the funds in the hands of the receiver. And thereafter the court made its order directing the payment of that sum to plaintiff, to which order we shall hereinafter refer. The payment was duly made out of the general funds in the receiver's hands, and not out of moneys to which the bondholders were or could be entitled. It also found that plaintiff's services in protecting the interests of these bondholders in the Seibert litigation were of the value of $50,000, and that he had necessarily expended in and about the matter the sum of $3,300. Judgment was ordered for the difference between what had been paid and the value of the services, with the sum so expended, and

this was made a lien on the fund in the hands of defendant Minneapolis Trust Company. This appeal is from an order denying defendant bondholders' motion for a new trial.

A consideration of the assignments of error which assail the first conclusion of law and the findings upon which it must have been based will dispose of plaintiff's case; a reversal of the order appealed from, with directions to enter judgment in defendants' favor, being inevitable. The conclusion was that plaintiff was not barred from recovering in this action by reason of the allowance made to and accepted by him in the Seibert foreclosure proceedings.

On the trial, defendants introduced in evidence a petition filed in the Seibert foreclosure proceedings by defendant the Farmers' Loan & Trust Company, the trustee named in the trust deed made to secure defendant bondholders. This petition was made by plaintiff Truesdale and the firm of Turner, McClure & Rolston, intervenors herein, as attorneys for and in behalf of said trustee. It set forth in detail the interest of the trustee in the Seibert litigation; the employment of these attorneys to protect said interest; the object and purpose of the defense made as against plaintiff Seibert, and also as against an intervening complaint filed in that action by one Griggs; that pending the litigation these attorneys prepared and filed a complaint in an action in which the petitioner, as trustee, was named as plaintiff, for the purpose of foreclosing the trust deed and also papers moving for the appointment of a receiver in said action. To state it concisely, this petition exhibited in a very circumstantial manner this plaintiff's claim for compensation for himself and Turner, McClure & Rolston in all matters connected with the Seibert litigation; and it included compensation for the services, and for the money expended, upon which plaintiff relied in the present action. It stated that, by reason of the facts, the petitioner had become liable to its attorneys in the sum of $50,000 for services, and was also liable for the money necessarily expended by them; that such services were of the value of $50,000, no part of which had been paid except $5,000, paid out of the trust funds by order of the court, and of which mention has already been made. By reason of the statements in the petition, the petitioner prayed for a further allowance of $45,000, and for an order directing the receiver to pay that sum to it, as and for its compensation, and for the liability and expenses so incurred. To this petition was attached the affidavit of this plaintiff

of the same general import, alleging necessary and proper expenditures in the sum of $1,500. This was supplemented by the affidavit of Mr. Turner, of the firm of Turner, McClure & Rolston, as to the extent and value of the services rendered, including an imperfect memorandum showing items of services rendered in New York from July 10, 1888, to April 12, 1893. Mr. Turner also sought to impress upon the court the fact that, for various reasons, it was a case in which liberal compensation should be awarded counsel, as well as fees to the trustee.

The court acted upon this petition and the attached affidavits, so much of its conclusion of law in the foreclosure proceedings as relates to the allowance of attorney's fees, reading as follows:

"Thirteenth. Upon the showing made to the court in respect to the reasonable charges for attorneys and counsel employed in this action by the several trustees of the different mortgages described in the complaint, there is allowed * * * to the attorneys and counsel of the Farmers' Loan & Trust Company of New York, defendant, trustee of one of the mortgages, in addition to the sum of $5,000, heretofore allowed and paid to them, the further sum of $15,000."

Later, counsel moved for an order directing the receiver to make this payment, expressly reserving all rights which they might have against other persons for further compensation. On the hearing of this motion, an order of the court was made, directing such receiver to pay over to the trustee or to plaintiff, as its attorney, the sum of $15,000, out of the earnings and income of the property in his hands. This order concluded as follows:

"And it is further ordered and adjudged that such payment to said trust company, or to said Hiram C. Truesdale, its attorney, shall not be construed, and shall not be a waiver of any rights that it or its attorneys may have against the persons or parties whom they represent and have represented in this matter to such further compensation for their services and expenses, respectively, over and above the said amounts so allowed by this court; and that this order is made and any money paid hereunder shall be without prejudice to any such rights."

From an examination of the petition and the affidavits, it is obvious that the whole matter was before the court when it made its conclusion of law in the Seibert case, awarding to plaintiff the additional sum of $15,000, all that it considered the petitioner and its counsel were entitled to on the showing made. The court passed upon the claim for an allowance of $50,000 for the identical services on which this

action was founded. It determined that the trustee was entitled to $20,000 in all, and no more, out of the trust estate, and as compensation for its services. The petitioner, by its counsel, accepted this allowance as in full for his claim against the estate when they applied for and obtained the order directing payment by the receiver. In so far as the trust estate was concerned, it is apparent that this was a final adjudication of the claim for attorney's fees, and that the proceeding as conducted and concluded was a bar to a distinct and independent action to recover additional compensation for the same services. The application and petition for fees and allowances in the Seibert case were analogous to a motion in the ordinary civil action.

In the case of Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490, it was stated that the determination of a motion is not res judicata, so as to prevent the parties from drawing the same matters in question again in an action. But on petition for reargument it was said that, possibly, this statement was too broad, and not universally true under our practice. The correct rule is that in the case of an order affecting a substantial right, and appealable, when a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion is an adjudication binding upon the parties, and conclusive to that extent. Dwight v. St. John, 25 N. Y. 203; Riggs v. Pursell, 74 N. Y. 370. This rule is directly applicable to the facts in the case at bar, and precludes the maintenance of an action designed to reach any part of the trust funds.

The question therefore is, was this such an action? Of this there can be no doubt, for replying to the contention of defendants' counsel that the funds upon which plaintiff is trying to impress a lien for services are not part of the trust estate, but have been set apart, and are now the individual property of the owners and holders of the interest coupons for the payment of which the court has directed that they be appropriated, counsel for plaintiff insist that it is nothing more than a proceeding or an independent action to enforce equitable rights in a fund still in the possession or under the control of the court, as a part of the trust estate. The very foundation of their case, whether it is a proceeding in the Seibert case or an original action, independent of that, is based upon the contention that the funds upon which a lien is sought are quite as much under the dominion of the court as they were prior to the making of the order setting them apart for a specified purpose. So

that the case is precisely in the situation it would have been had it been instituted before that order was made.

But it is urged that the order of the court upon which plaintiff received the allowance of $15,000 expressly provided that payment should not be construed, and should not be a waiver of any rights that the trustee or its attorneys might have against the parties or persons whom they represented in the Seibert action, and hence this action may be maintained. There would be much force in this claim if this action was against the parties or persons so represented. But, as we have said, it is not. It is a proceeding to reach the funds in the hands of the court as part of the trust estate, and does not come within the exception provided for in the order. It is not an action to recover the balance due for services from the parties or persons the attorneys represented in the Seibert litigation.

To conclude: If the funds are still a part of the trust estate, plaintiff is barred by the final order of allowance; and, if the funds in question do not belong to that estate, the plaintiff has no lien upon them which he can enforce in a court of equity.

The order is reversed, and, upon remittitur, judgment will be entered in the court below in favor of defendants.

On Application for Rehearing.

April 15, 1897.

PER CURIAM. Counsel for respondents, in his petition for reargument, urges that the trust fund out of which attorney's fees were allowed to him in the Seibert case was the general fund in that case, not any fund which belonged to these defendants, while in this case respondents are proceeding against the fund of these defendant bondholders, the trust fund procured for them by the services of Truesdale, and that the order allowing attorney's fees out of one trust fund is no bar to an application for the same attorney's fees out of another and different trust fund.

It seems to us that in taking this position counsel does not take into consideration all of the facts. Truesdale's application in the Seibert case was not for attorney's fees out of any particular fund. In granting the application the court could have allowed him attorney's fees out

of the general fund, or out of the fund to be taken from such general fund, and applied on the interest claim of these bondholders; or the court could have allowed such fees partly out of each fund, or it could have allowed them, and left it to be determined in the future as to how they should be apportioned between the two funds. In that application, Truesdale presented all his equitable rights against both funds, and both funds were within the control of the court in that proceeding. There is nothing to show that the court did not award him all that it considered that he was entitled to receive out of all the different funds in court. The mere fact that the court ordered it paid out of the general fund does not, as contended by counsel, show that the court only awarded him what it considered to be the benefit or value of his services to all parties interested in that fund. The evidence discloses but little which Truesdale did that was beneficial to the general fund, and the reasonable value of that little was nowhere stated. His client's interest was hostile to that of those who procured the general fund, and his services consisted mainly in protecting his client's interest, and obtaining a share of that fund to pay interest on the bonds secured by the trust deed under which his client is trustee. That trust deed provides for the payment of attorney's fees and other expenses incurred by the trustee, and from the circumstances we held in this case that the court allowed Truesdale all it deemed him equitably entitled to receive out of any and all funds in court, and ordered the amount so allowed to be paid out of the general fund. This exhausted his equitable rights against the interest money ordered paid to these defendant bondholders, just as much as if the amount awarded him was ordered paid out of that money instead of out of the general fund. If the court erred or abused its discretion in awarding him too small an amount, his remedy was by appeal; the decision is none the less conclusive.

Counsel further contends, that if respondents are entitled to no other equitable relief, they should be given judgment requiring and compelling the trustee to collect the amount of plaintiff's compensation from the defendant bondholders. When and under what circumstances, if any, such an equitable remedy would be allowed, we need not consider. Truesdale presented his petition for the full amount claimed to be due him, and asserted his rights in the usual and most appropriate equitable proceeding in such a case. The court had power to grant

him full relief, and award him all that was equitably due him. He obtained relief which, in our opinion, is a bar to his asserting those rights in the manner now proposed.

The petition for a reargument is denied.

WILLIAM F. GRAVES v. GILES W. MERRILL and Others.[1]

April 8, 1897.

Nos. 10,220—(221).

Building Contractor's Bond—Action for Breach.

Plaintiff made a contract with M. to furnish all materials and labor and build for plaintiff a house for a stipulated sum, to be paid as the work progressed, not exceeding 85 per cent. of the total amount of materials and labor furnished, the balance to be withheld until completion of the contract. M., as required by the contract, gave the plaintiff a bond, with E. as surety, indemnifying him against liens. *Held*, in an action against E. for a breach of the conditions of the bond, that the fact that the plaintiff, during the progress of the work, made payments to the contractor exceeding 85 per cent. of the contract price, without proof that such payments exceeded 85 per cent. of the total amount of the materials and labor already furnished for the construction of the house, did not constitute a defense.

Appeal by defendant Eaton from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial. Affirmed.

Flandrau, Squires & Cutcheon, for appellant.

Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Wheaton v. Wheeler, 27 Minn. 464, 8 N. W. 599; Allis v. Ware, 28 Minn. 166, 9 N. W. 666; Campion v. Whitney, 30 Minn. 177, 14 N. W. 806; Wager v. Brooks, 37 Minn. 392, 34 N. W. 745; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62; Bell v. Forrestal, 55 Minn. 431, 57 N. W. 55, 223; Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864; Duluth v. Heney, 43 Minn. 155, 45 N. W. 7; National Inv. Co. v. Schickling, 56 Minn. 283, 57 N. W. 663; Reed v. McGregor, 62 Minn. 94, 64 N. W. 88; Harsh v. Klepper, 28 Oh. St. 200; Bank v. Lane,

[1] Reported in 70 N. W. 562.

8 Oh. St. 405; Erath v. Allen, 55 Mo. App. 107; Oberbeck v. Mayer, 59 Mo. App. 289; Bethune v. Dozier, 10 Ga. 235; Rowan v. Sharps' Rifle Mfg. Co., 33 Conn. 1; United States v. Tillotson, 1 Paine, C. C. Rep. 305, Fed. Cas. No. 16,524; Bank v. Douglass, 51 Ga. 205; General St. N. Co. v. Rolt, 6 Com. Bench (N. S.) 550; Eneas v. Hoops, 42 Jones & S. (N. Y. Super. Ct.) 517; Bragg v. Shain, 49 Cal. 131; Taylor v. Jeter, 23 Mo. 244; Calvert v. London Dock Co., 2 Keen, Ch. Rep. 638; Zimmerman v. Judah, 13 Ind. 286; Judah v. Zimmerman, 22 Ind. 388; Miller v. Stewart, 9 Wheat. 680, were cited.

W. D. Cornish, for respondent.

PER CURIAM. This is an appeal by the defendant Eaton from an order of the district court for the county of Ramsey denying his motion for a new trial. The cause was tried by the court without a jury, and judgment ordered upon the findings of fact for the plaintiff against the defendants in the sum of $2,397.02. The findings of fact are supported by the evidence. The facts are these: July 13, 1893, the plaintiff enters into a written contract with the defendant Merrill, whereby the latter agrees to furnish all labor and materials and build a dwelling house for the plaintiff, according to certain plans and specifications, for the agreed price of $16,109.45, to be paid in instalments as the work progresses, on the certificate of the architect in charge, in amounts not exceeding 85 per cent. of the total amount of materials and labor furnished at the building at the time the certificate is issued; the balance of 15 per cent. to be withheld until the contract is entirely finished and accepted, when the amount thereof will be incorporated in the amount of the final certificate, the condition being that, prior to first payment being made, the contractor should furnish a satisfactory bond to protect the plaintiff against liens to the extent of $25,000. The contract further provided that before each payment, if required, the contractor should give to the architect sufficient evidence that the premises were free from liens chargeable to the contractor.

Pursuant to this contract, the contractor gave to the plaintiff a bond, with the defendants Eaton and Rodger as sureties, in the sum of $25,000, conditioned that the contractor should promptly pay for

all material and labor furnished for the construction of the dwelling house, pursuant to the contract, before the filing of any mechanics' liens therefor, and fully indemnify the plaintiff from any and all such liens. This condition of the bond was not performed, in this: that liens were filed and adjudged to be valid against the plaintiff's premises for the construction of the dwelling house, and the plaintiff was compelled to, and did, pay, in excess of the contract price, $2,397.02, for the purpose of discharging such liens. This action was brought on the bond to recover the amount so paid.

The defendant Eaton answered, alleging, among other matters, that the plaintiff and the contractor Merrill, without the knowledge of the defendant, failed to observe and perform the terms of the building contract in respect to the payments to be made thereon; that instead of paying to the contractor only 85 per cent. of the total amount of material and labor furnished at the building, and withholding 15 per cent. thereof, the plaintiff paid to him a sum exceeding 85 per cent. of such material and labor, and did not retain 15 per cent. of the contract price thereof, by reason of which violation of the terms of the contract the liens were made larger than they otherwise would have been. These allegations were in issue, and the trial court's findings of fact as to them were as follows:

"Defendant Merrill performed the work provided for in said contract, and the same was completed, save in some unimportant particulars, on April 14, 1894. * * * The plaintiff paid said Merrill at various times during the progress of the work, on account of said contract price and upon the certificate of the architect, various sums, amounting in all to fourteen thousand eight hundred forty-seven 55-100 (14,847.55) dollars; the last payment being made upon said April 14, amounting to one hundred forty-five 72-100 (145.72) dollars. The last eleven payments, made at divers times from February 7 to April 14, inclusive, amounting to two thousand four hundred sixty-six 55-100 (2,466.55) dollars, were applied by said Merrill in payment for labor and material furnished him for use in, and used in, constructing said building under said contract. Plaintiff has not made other or further payments to said Merrill. It does not appear that the plaintiff knew at any time, until after the last payment was made to said Merrill, as aforesaid, that any of the material or labor used in or furnished for the erection of said building had not been paid for."

It is apparent from these findings that more than 85 per cent. of the contract price was paid by plaintiff to the contractor during the progress of the work, but there is neither finding nor evidence that

such payments at any time exceeded 85 per cent. "of the total amount of materials and labor furnished at the building."

The claim of the surety Eaton, stated in the exact words of his counsel, is this:

"There is but one question in this case. The building contract provided that not more than 85 per cent. of the price of the building should be paid before its completion. The defendant Eaton became surety for the builder against liens. The owner violated the contract, by paying $1,154.52 more than the 85 per cent. before building was completed; liens accrued; and instead of having in his hands 15 per cent., being $2,416.41, to pay them with, he had only $1,276.90. Did this violation of the original contract discharge the sureties? There is no question about the facts; they stand conceded."

Now, if the assumption of facts which counsel accepts as the premises of his proposition is correct, his conclusion that the surety was released may be conceded. But his premises are unsupported by either finding or evidence. The contract was not that no more than 85 per cent. of the contract price of the building should be paid during the progress of the work, but that such payments should not exceed 85 per cent. of the "total amount of materials and labor furnished at the building at the time said certificate is issued." Such is the plain reading of the contract, and such is the construction placed upon the language of the contract by the defendant in his answer. There is no room for construction or argument. The simple statement of the facts of this case is the argument of the case. It by no means follows that 85 per cent. of the contract price would equal or exceed 85 per cent. of the amount of materials and labor furnished. As the only breach of the building contract here claimed is that payments were made by the plaintiff in violation of the contract, and as there is no evidence in the record to support the claim, it follows that the order appealed from must be affirmed.

So ordered.

BUCK, J. I dissent. It may be unusual to state the facts fully in a dissenting opinion, but, at the risk of criticism, I feel impelled to do so in this case.

On July 13, 1893, the plaintiff, Graves, entered into a building contract with Merrill, one of the defendants, by which Merrill agreed to build a dwelling for plaintiff for the sum of $16,109.45, to be paid

as the work progressed, on certificates of the architect named in the contract, not to exceed 85 per cent. of the whole contract price, the balance (15 per cent.) to be withheld until the contract was entirely finished and accepted, when this amount was to be incorporated in the final certificate issued. Merrill also agreed to furnish Graves a good and satisfactory bond of $25,000, to protect him against liens to that amount, which he did, and the same was executed at the same time as the contract, the sureties being Rodger and Eaton, two of the defendants. The condition in the bond was as follows:

"The condition of the above obligation is such that whereas, the said G. W. Merrill has, by written contract of even date herewith, undertaken and agreed with the said William F. Graves, in consideration of the sum of $16,109.45, to construct for him upon lots five (5) and six (6) of Bryant's subdivision of block four of Palace addition to St. Paul a frame dwelling house, according to plans and specifications made by C. H. Johnston, the architect, and to furnish and pay for all labor and material required in the performance of his said contract: Now, therefore, if the said G. W. Merrill shall promptly pay for, or cause to be paid for, all labor and material which shall be furnished for the construction of said dwelling house under or pursuant to said contract, or in the performance thereof, before any mechanic's lien therefor is filed in the office of the register of deeds of Ramsey county, Minnesota, against said premises, and shall also fully indemnify and hold harmless the said Graves from any and all such liens, and fully protect said premises therefrom, then the above obligation to be void; otherwise, to remain in full force and virtue.

"G. W. Merrill. [Seal.]
"Wm. Rodger. [Seal.]
"Chas. Eaton. [Seal.]"

The contractor completed the building, save in some unimportant particulars, on April 14, 1894, on which day Graves moved into it. He made the first payment to Merrill August 21, 1893, and continued to make further payments from time to time until March 5, 1894, when he made a payment of $425, which, added to former payments, aggregated the sum of $13,971, paid up to that date; and he continued to make six more payments before the house was finished, amounting to $876.55, the last payment being $145.72, which he made on the day he took possession of the premises, April 14, 1894, the entire payment amounting to $14,847.55. Eighty-five per cent. upon the contract price, $16,109.45, is $13,693.03, which amount had been paid by Graves to Merrill up to and including March 3, 1894, more than one month before the contract was completed. The

total payment up to that date, therefore, amounted to $277.97 in excess of the 85 per cent., and the subsequent payments made by Graves, up to and including the payment made on the day he took possession of the dwelling, amounted in all to the sum of $1,154.52 in excess of the 85 per cent. which he was to withhold under the terms of the contract until it was entirely finished and accepted. Subsequently, Merrill made default in the payment for certain labor employed and material furnished and used in building said dwelling under his contract, and several parties brought actions against him under the mechanic's lien law, and recovered judgment liens against the property, amounting to the sum of $3,673.92; and plaintiff, in order to save his property from sale under said judgment liens, was compelled to pay the same. In doing so, he first applied the amount remaining in his hands unpaid upon said contract, viz. $1,276.90, and brought this suit upon the balance, viz. $2,397.02, for which he demands judgment, with interest from October 31, 1894.

Before stating the law which I deem applicable to this case, a further reference to some of the provisions of the contract is necessary: (1) The architect is made the agent of the owner of the premises. (2) The payments were all to be made under the certificate of the architect. (3) The final payment, including the 15 per cent., was to be paid within 30 days after the contract was completely finished. (4) The contractor was to perform and finish under the direction and to the satisfaction of the architect. (5) Before each payment the architect was authorized to require of the contractor good and sufficient evidence that the premises were free from all liens and claims chargeable to him. (6) The owner of the premises was authorized to retain out of any payment an amount sufficient to indemnify himself against any lien or claim for which he would be liable and chargeable to the contractor until such lien or claim should be effectually satisfied and discharged or canceled. (7) One of the paragraphs of said contract is as follows:

"And the said owner hereby promises and agrees with the said contractor to employ, and does hereby employ, him to provide the materials and to do the said work according to the terms and conditions herein contained and referred to, for the price aforesaid, and hereby contracts to pay the same, at the time and in the manner and upon the conditions above set forth."

At or before the time of making each payment, the plaintiff was furnished by the architect a certified written statement of the contract price, the amount previously paid, the amount then due, and the balance unpaid. Thus, the plaintiff, at the time of each payment, had before him the precise data as to whether he had or was about to pay more than the 85 per cent. It is not claimed that there was any mistake of the architect, and no ground for the plaintiff to plead ignorance of the exact state of the account between him and the contractor, Merrill. I assume, then, that plaintiff made the payments in excess of the 85 per cent. understandingly and intentionally, and the question is, were these payments such a violation of the original contract as to discharge the sureties? The trial court decided in the negative, and the only ground which I discover for its so holding was that

"It does not appear that the plaintiff knew at any time until after the last payment was made to said Merrill, as aforesaid, that any of the material or labor used in or furnished for the erection of said building had not been paid for."

Whether this was the sole ground or not upon which the learned trial court found against the sureties, I am of the opinion that the ruling upon the entire case was erroneous. The stipulation in the building contract for the retention of the 15 per cent. until the completion and acceptance of the work was as much for the indemnity of Rodger and Eaton as for Graves, the owner of the premises, and raises an equity in the fund thus reserved, and a disregard of such stipulation by the voluntary act of Graves operated to discharge the sureties. It is true that the bond was not given for the full performance of the original contract, but for indemnity against liens; yet it must be read and construed in the light and relation which it bears to that part of the contract to which, by its terms, it has reference. It expressly refers to the building contract, the name of the parties, the kind of building to be constructed, and the cost thereof, and that Merrill was to furnish and pay for the labor required in the performance of the contract.

The bond runs to the plaintiff, Graves, the owner of the premises, and the party to the original building contract; and while, by its terms, the sureties are obliged to save him harmless, and indemnify him against liens, he cannot be permitted to violate those terms himself,

and thus cast a burden upon the sureties by his own negligence or wrongdoing. It was with reference to this contract that the bond was executed. Graves cannot be permitted to say that he was merely a party to the bond, and hence that his liability is not measured by his default in grafting upon the contract its changed conditions. In order to state a cause of action, the plaintiff was compelled to allege a part of the terms of the contract, and their violation, as well as a breach of the conditions of the bond; and, to defend himself against the allegagations in the defendants' answer, he deemed it necessary to plead in his reply the entire contract. Now, if any of its terms constituted the groundwork for an affirmative cause of action against the sureties, then a material violation of those terms by the plaintiff, to the injury or damage of the sureties, would constitute the basis, on their part, for a defense more or less effective, according to the materiality of the evidence adduced. Therefore the obligations of the sureties upon the bond must be determined with reference to the provisions of the contract and the bond bearing upon the same subject-matter, and the conduct of the parties as affecting the same.

If I concede that if the contractor had furnished the architect, before each payment, good and sufficient evidence that the premises were free from all liens and claims chargeable to the contractor, and he had done so, and that the sureties would have been bound thereby, yet no such evidence was required or furnished, and Graves made no attempt to learn whether any such liens existed, although, under the explicit terms of the building contract, he had the right to retain out of any payment due or to become due an amount sufficient to completely indemnify him against any such liens. The architect did furnish to Graves a certificate showing that Graves was paying to the contractor various sums greatly in excess of the 85 per cent., but he did not require of the contractor any evidence that the premises were free from liens, nor furnish Graves a certificate to that effect.

It is therefore self-evident that two causes tended to create that which plaintiff claims to constitute his cause of action against the sureties. These causes are neglect of the architect to require satisfactory evidence of no liens, and the omission of the plaintiff to ascertain if any lien existed, and his neglect to retain a sufficient sum out of any payment then due or to become due as against any such lien. Upon whom rested the responsibility or liability for this negligence? Cer-

tainly not on the sureties, for they had no control over the contractor, architect, or owner of the premises or parties who furnished labor or material. As Graves had the absolute right to retain from the several payments to be made a sufficient amount to indemnify him against liens, it was his duty to find out whether any liens existed, and to this end he had a right to inquire of his own architect as to such liens, and the contractor could not legally demand payment if he refused to furnish sufficient evidence that the premises were free from liens if required by the architect. Thus, knowledge of these liens, or negligence on the part of Graves in not knowing of their existence, is brought clearly home to him; and if, under these facts, he paid Merrill an excess of 85 per cent. in violation of the explicit terms of the contract, the liability is his, not that of the innocent sureties; otherwise, he would be taking advantage of his own wrong,—something which the law always abhors. The sureties were mere volunteers, expecting no profit or advantage, and should be dealt with in fairness and good faith. If Graves desired or was willing that any changes or alterations should be made in the terms of the original contract, he should have sought the assent of the sureties; otherwise, he must be deemed to have violated them at his own risk.

It cannot be said in this case that the sureties were not prejudiced by the payment of the sums in excess of the 85 per cent. The sum so paid withdrew the fund agreed upon as security, without the sureties' consent; and it was done by the principal, when he had the express authority, by the explicit terms of the contract, to retain it, not only for his own benefit, but, in so doing, it would have operated for the protection of his sureties. There are very eminent authorities holding that in such cases the sureties are released, no matter how trivial the change, or even if it be to the advantage of the sureties, and that they have a right to stand upon the very terms of their express engagements and undertaking. If the original contract is changed, the sureties are not bound by it in the changed form. They have a right to insist upon the strict terms of the contract, and cannot be forced to stand upon any new ones, and a variation from the original terms to which they do not consent is fatal.

That a disregard of such stipulations in a contract by the voluntary acts of the principal or creditor operates to release the sureties is fully sustained by authorities. Thus, in Calvert v. London Dock Co. (1838)

2 Keen, 638, where a contractor had undertaken to perform certain work, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work, it was held that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three-fourths of the work done having been made to the contractor, without the consent of the sureties, before the completion of the whole work. To the argument that the extra advances really went into the work, and so inured to the benefit of the sureties, Lord Langdale, M. R., answered as follows (page 644):

"The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security. In this case the company were to pay for three-fourths of the work done every two months. The remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work if he did not; and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship."

In General S. N. Co. v. Rolt (1859) 6 C. B. (N. S.) 550, upon a second appeal of the case, the exchequer chamber held that a plea by a surety to an action to recover from him the excess of cost in completing a ship after the contractor had made default, and also a stipulated sum by way of damages for delay, to the effect that the owner, without the consent of the surety, had allowed the builder to anticipate a greater portion of the last two instalments specified in the contract, and thus materially

and prejudicially alter the surety's position, was a prima facie answer to the action; and that the onus lay upon the plaintiffs to prove the allegations of their reply that the advances were made with the knowledge and assent and at the request of the surety. It was argued on behalf of the plaintiffs, among other contentions, that, under the circumstances in the case, there was nothing to show that the defendant could be prejudiced in his capacity of surety by any of the advances made by the plaintiffs, and therefore he was not discharged from his liability of surety. The appellate court declined to hear counsel for the plaintiffs. In announcing the opinion of the court affirming the judgment below, Pollock, C. B., said (page 604):

"Now, certainly, prima facie, the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is now called upon to pay damages, is a prejudice to the surety. He is not in the same situation with regard to his principal in which he ought to be placed. He is deprived of the security of the fund out of which the company might, in the first instance, have indemnified themselves. With regard to the point that there was constructive notice, that has very properly been abandoned by Mr. Welsby. It is clearly not tenable. Prima facie, the surety was prejudiced by the existing state of things. Whether there could have been any proof to show that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guaranties."

Holme v. Brunskill (1877) L. R. 3 Q. B. Div. 495, substantially reiterated the principle decided in the earlier cases. Cotton, L. J., with whom concurred Lord Justice Thesiger, said (page 505):

"The true rule, in my opinion, is that, if there is any agreement between the principals with reference to the contract guarantied, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that, if it is not self-evident that the alteration is unsubstantial or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or

not he will consent to remain liable, notwithstanding the alteration, and that, if he has not so consented, he will be discharged."

The rulings of the United States supreme court have been equally emphatic in upholding the right of a surety to stand upon the agreement with reference to which he entered into his contract of suretyship, and to exact strict compliance with its stipulations. Thus, in the case of Miller v. Stewart, 9 Wheat. 680, Mr. Justice Story, in delivering the opinion of the court, said (page 702):

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract: and if he does not assent to any variation of it, and a variation is made, it is fatal."

In Reese v. U. S., 9 Wall. 13, Justice Field, delivering the opinion of the court, said (page 21):

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it, without their assent, discharges them, and for obvious reasons. When the change is made, they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Finney v. Condon, 86 Ill. 78, was a dispute over a building contract, and, although it was there held that the surety was bound by the estimate of the architect, yet the rule applicable to obligation of sureties in cases of the kind under consideration was that enunciated by Justice Scott, who said (page 80):

"The point relied on most confidently in the defense is that the sureties for the performance of the contract are released from all liability

thereon on account of payment exceeding 85 per cent. of the work done having been made to the contractor, without their consent, before the completion of the work. The law upon this subject seems to be, the reserved per cent. to be withheld until the completion of the work to be done is as much for the indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed. And there is great justness in the rule adopted. Equitably, therefore, the sureties in such cases are entitled to have the sum agreed upon held as a fund out of which they may be indemnified, and, if the principal releases it without their consent, it discharges them from their undertaking. The principle is, the withdrawal of the fund agreed upon as security for the performance of the contract without his consent is a prejudice to the surety or guarantor. Sureties and guarantors are not to be made liable beyond the express terms of their engagements. They have the right to prescribe the terms and conditions on which they will assume responsibility, and neither of the principals can change those terms without the consent of the sureties, even with a view to avoid ultimate liability."

Bragg v. Shain, 49 Cal. 131, was a building contract, and payments were to be made in monthly instalments, of 75 per cent. of the value of the materials furnished and work done, and remainder when work was completed. A surety agreed that the building should be delivered free from all liens. There was default by the contractor in paying for material and labor, and liens were filed and paid by the owner of the building, who also had paid the contractor during the progress of the work more than the 75 per cent.; and it was held that the surety was discharged from liability.

In Brandt, Sur. § 345, the rule laid down is that:

"A surety for the completion of work to be performed by the principal, where, by the terms of the contract, the principal is to be paid by instalments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time. There must be an assent by the surety to the creditors dealing with the principal debtor otherwise than in the manner pointed out by the contract, and it is no answer to say that it is for the advantage of the surety; or that he has sustained no prejudice."

In Simonson v. Grant, 36 Minn. 439, 31 N. W. 861, substantially the same rule is applied.

As the owner, according to the terms of the contract, was entitled to retain in his own hands an amount sufficient to completely indemnify him against liens until they were satisfied, and also obligated himself to retain 15 per cent. of the contract price until the building was com-

pleted and accepted, and he voluntarily abandoned this primary security, in which the surety had an interest with himself, we are of the opinion that his conduct operated to release the surety from any liability upon the bond, and the loss must be borne by the owner, through his own negligence or misconduct. In the recent cases, Prairie State Nat. Bank of Chicago v. U. S., and U. S. v. Hitchcock, 164 U. S. 227, 17 Sup. Ct. 142, the principles enunciated in several of the foregoing authorities were stated with approval; and, applying them to the case at bar, I am of the opinion that the order denying the motion for a new trial should be reversed.

MAE ALICE LOCKWOOD v. JOHN E. LOCKWOOD and Wife.[1]

April 13, 1897.

Nos. 10,290—(243).

Married Woman—Alienation of Husband's Affections.

A married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them.

Same—Damages—Sufficiency of Evidence.

Evidence considered, and *held* sufficient to justify a verdict for the plaintiff, and that the amount of the verdict is not excessive.

Appeal by defendants from an order of the district court for Hennepin county, Elliott, J., denying a new trial. Affirmed.

Koon, Whelan & Bennett, for appellants.

The question in this case is not whether in Minnesota a married woman can maintain an action in her own name for enticing away her husband. Certain facts in this case differentiate the question here from that question. (1) After plaintiff's marriage the defendants gave her a home and asylum. (2) At the time of the alleged enticement plaintiff and her husband were members of defendants' household. (3) While subjected to ill treatment there by both her husband and his

[1] Reported in 70 N. W. 784.

parents, plaintiff left their house and her husband's bed and board. (4) He did not follow her, but continued to live at home. (5) Plaintiff continued to live apart from her husband, he meantime furnishing her with separate support. (6) Her action is for his abandonment of her induced by his parents. (7) Her action is against his parents. By reason of these facts plaintiff cannot maintain this action, even if such a right of action belongs to a married woman under the Minnesota law.

No duty was imposed by law upon these parents to furnish plaintiff a home or asylum. Pollock v. Pollock, 9 Misc. (N. Y.) 82, 29 N. Y. Supp. 37; Young v. Young, 8 Wash. 81, 35 Pac. 592. If the ill treatment of plaintiff, which she received at defendants' hands, was the sole cause of her abandonment of her husband, this action will not lie. The parents of her husband are not liable in a suit for alienating the affections of their son when they, without provocation, drive her away from their home and permit him to remain. They have a perfect right to drive her away. Young v. Young, supra. The motives of a parent in counseling a married child in his domestic affairs are presumed to be good, until the contrary is made to appear. If the parent act in good faith no suit lies against him. Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638; Hutcheson v. Peck, 5 Johns. 195; Tucker v. Tucker, 74 Miss. 93, 19 South. 955; Smith v. Lyke, 13 Hun, 204; Bennett v. Smith, 21 Barb. 439; Huling v. Huling, 32 Ill. App. 519.

The complaint must allege that the parent's act was done maliciously, and the evidence must positively show malice or it must necessarily be deduced from the circumstances. Reed v. Reed, supra; Westlake v. Westlake, 34 Oh. St. 621; Tucker v. Tucker, supra; Hutcheson v. Peck, supra. This case does not contain any positive evidence of malice or of circumstances from which malice must necessarily be deduced. The presumption of fact, that the parent acted only for the best interest of his child, must be clearly overcome by plaintiff by weight of evidence. Pollock v. Pollock, supra. Charge of Judge Mitchell in Huot v. Wise, 27 Minn. 68, 6 N. W. 425; MS. record of case.

Apart from the distinguishing features of this case, plaintiff has no right of action. Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438; 2 Cooley's Blackst. 143; Van Arnam v. Ayers, 67 Barb. 544; State v. Pulle, 12 Minn. 99 (164); Pyeatt v. Powell, 10 U. S. App. 200, 2 C. C. A. 367, 51 Fed. 551; Doe v. Roe, 82 Me. 503, 20 Atl. 83; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522. Reason and natural justice require

that an action by a married woman against a third person shall not lie, so long as her husband is an incompetent witness in the case. G. S. 1894, § 5662. G. S. 1894, §§ 5530, 5531, 5159, do not give any such right of action to a married woman.

The cases of Lynch v. Knight, 9 H. L. 577, and of Westlake v. Westlake, 34 Oh. St. 621, were both actions for slander and were decided by a divided court. The ecclesiastical law of England was no part of the common law and has never been adopted here. Any argument from the ecclesiastical law, as attempted in Weldon v. Weldon, L. R. 9 P. D. 52, and Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492, is inept. The fallacy in the cases of Warren v. Warren, 89 Mich. 123, 50 N. W. 842, and Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, was in holding (1) that the common law gives a wife a legal right to the consortium of her husband, and (2) that the common law ever gave her, alone and independent of her husband, a remedial right for breach of any right of person. Want of right and want of remedy are the same thing. 1 Bacon, Abr. 66; Ashby v. White, 2 Ld. Raym. 938. Under the common law of this state, as modified by statute, a married woman has not this right of action, and any construction of the existing law giving her such right amounts to judicial legislation. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018; Kroessin v. Keller, 60 Minn. 572, 62 N. W. 438; Pett-Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912; Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206.

Under G. S. 1894, § 5662, plaintiff was an incompetent witness without the consent of her husband. Every word of her testimony to prove her separate action against defendants established the right of joint action, which, in principle, she had against defendants and against her husband. In applying a statute to new conditions or to a new class of cases, evidently not within its purview when enacted, courts will so construe it as to carry out the evident intent of the statute and preserve justice.

Welch, Hayne, Hubachek & Conlin, for respondent.

The cases cited by opposing counsel that parents may advise a married child recognize the rule with proper limitations. Schouler, Dom. Rel. § 41. The right of the parent is confined to giving good advice honestly. For an exception see Williams v. Williams, 20 Colo. 65, 37 Pac. 614; Hutcheson v. Peck, 5 Johns. 196. In Young v. Young, 8

Wash. 82, 35 Pac. 592, the plaintiff was the wife and lived at the home of her husband's parents. It appears from the opinion in that case plaintiff had been in no wise maltreated while living there, and there was no direct evidence that her husband had ever refused to live with her, or that the appellants had ever undertaken to induce their son to abandon his wife. The right of the parent to advise his child is recognized when the necessity of the situation justifies such action by the parent. Smith v. Lyke, 13 Hun, 204; Tucker v. Tucker, 74 Miss. 93, 19 South. 955.

Van Arnam v. Ayers, 67 Barb. 544, was overruled in Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, and disregarded in Baker v. Baker, 16 Abb. N. C. 293. The opinion in the Baker case proves the fallacy of appellants' contention that loss of the wife's services is the gist of the action. See Bigelow, Torts, 153; Rinehart v. Bills, 82 Mo. 534. Wisconsin, Maine, New York (but see Bennett and Baker cases, supra,) and Indiana (but see Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389) are the only states which have ever denied to the injured party the right of action for alienation of her husband's affections. Clow v. Chapman, 125 Mo. 101, 28 S. W. 328; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodgkinson v. Hodgkinson 43 Neb. 269, 61 N. W. 577; Foot v. Card, 58 Conn. 1, 18 Atl. 1027; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577; Warren v. Warren, 89 Mich. 123, 50 N. W. 842; Lynch v. Knight, supra; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932. Bennett v. Bennett, supra; Jaynes v. Jaynes, 39 Hun, 40; Waldron v. Waldron, 45 Fed. 315; Bassett v. Bassett, 20 Ill. App. 543; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389; Wolf v. Wolf, 130 Ind. 599, 30 N. E. 308; Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99; Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638; Breiman v. Paasch, 7 Abb. N. C. 249; Baker v. Baker, 16 Abb. N. C. 293; Warner v. Miller, 17 Abb. N. C. 221; Churchill v. Lewis, 17 Abb. N. C. 226; Westlake v. Westlake, 34 Oh. St. 621; Mehrhoff v. Mehrhoff, 26 Fed. 13. G. S. 1894, § 5530, is conclusive on this point, whether at common law the wife had or had not a right of action.

BUCK, J. This action was brought against John E. Lockwood and Mattie Lockwood, husband and wife, to recover damages for the alleged alienation by them of the affections of Edwin L. Lockwood, their son, from his wife, the plaintiff, Mae Alice Lockwood, and for her

consequent loss of his support, protection, and society. The answer of the defendants was a general denial, and upon trial to a jury the plaintiff had a verdict for $15,000; and defendants' motion for a new trial having been denied, they bring this appeal. All the parties have resided in the city of Minneapolis for many years. At the time of plaintiff's marriage she was 30 years old, and her husband's age was 35. They were married on November 8, 1894, and the separation took place on the 25th or 26th day of September, 1895. The defendant John E. Lockwood is the president of the Union Iron Works, in the city of Minneapolis, and the son, Edwin L. Lockwood, is the secretary and treasurer of the company. The elder Lockwood lives in a very nice home, and has horses and carriages, and everything necessary to live comfortably.

The marriage of Edwin L. Lockwood and this plaintiff took place at the home of a mutual friend without the knowledge of the defendants. The plaintiff's husband has always lived with his parents. On the day of his marriage he announced it in a note written to his parents, and the father, by note, invited him and his wife to come to his home and live; stating therein, also, that he was surprised, but pleased, to hear of their marriage, and that he always had great respect for the plaintiff. The next day the plaintiff and her husband went to defendants' house to reside, and resided there until their separation in the month of September, 1895.

Previous to the time of her marriage, plaintiff had supported herself by her own labor as a dressmaker, and for several weeks at a time, in the spring and fall, for three years previous to her marriage, had worked as dressmaker for the defendants at their home, where she first met her future husband. The character and reputation of the plaintiff stand unchallenged. Nowhere, either in the record or in the argument of counsel, is it assailed in the slightest degree. Therefore want of good character formed no basis for the unfortunate family difficulties resulting in the bringing of this action, and which the defendants' counsel strenuously contends cannot be maintained by the plaintiff, as wife of Edwin L. Lockwood, even if the conduct of the defendants was the primary cause of alienating his affections from plaintiff, and depriving her of his support, protection, and society.

1. At common law the husband had a right of action for damages against third persons for alienating the affections of the wife, enticing

her away, and depriving him of her society; but whether the wife had this right at common law against third persons for alienating the affections of her husband, enticing him away from her, and thus depriving her of his society, protection, and support, we do not deem material in this case. It is ruled in some jurisdictions that she has no such right, while in others it is held that she may maintain such action upon common-law principles. The question has never been passed upon by this court either as a common-law or statutory right. But upon an examination of our statutes we find that many of the disabilities under which married women labored at common law have been removed. The letter and spirit of these laws tend strongly to place the wife upon an equality with the husband as respects her property and personal rights. If, therefore, there is any authority under the statute to enforce her rights in regard to such matters by proceedings in her own name, independently of her husband, we need not seek in the principles of the common law for authority to uphold her right to maintain this action. Equality of right ought to give equality of remedy. If there are exceptions, we see no grounds upon which they should be applied in a case of this kind, where the rights and remedies of the parties should be reciprocal. In the case of Warren v. Warren, 89 Mich. 123, 127, 50 N. W. 842, it is well said by the court:

"There has never been any reason urged against the right of the husband to sue for the loss of the consortium of his wife. And if, as shown, the wife is now, under either the liberal letter or spirit of our marriage laws, entitled, as of her own property, to the damages arising from her personal injuries,—the injuries to her body or mind,—there can be no good reason why she cannot sue for and recover damages for the loss of the consortium of her husband that does not equally and as well apply to the suit of the husband on account of the loss of her society. The wife is entitled to the society, protection, and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household."

Our constitution (article 1, § 8) provides that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character. Unless there is some plain provision of law to the contrary, a married woman should receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she should have the same right to appeal, in her own name alone, to the courts of law or

equity, for redress and protection, that her husband has to appeal in his name alone. What rights has he to protect? His reputation, person, property, character, and his natural rights. She has the same right. Is her right to the conjugal society of the husband one that comes within the letter and spirit of existing laws? In the case of Foot v. Card, 58 Conn. 1, 8, 18 Atl. 1027, it is said:

"So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him."

The husband's right of action does not rest upon the ground of loss of service, but upon the loss of conjugal society or consortium arising by virtue of the marriage contract. Bigelow, Torts, 153. Jaynes v. Jaynes, 39 Hun, 40, 43, in which it is also said that such a right was a property right, but,

"If it be not property in the sense in which the word 'property' is used in the statute cited, it is a personal right; and as the statute extends to all injuries, whether to property, person, or character, it seems to be sufficiently comprehensive to embrace an injury to the right in question."

See, also, Warren v. Warren, 89 Mich. 123, 50 N. W. 842, to the same effect. In Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, it was held that such an interference with the rights of the wife was a violation of her natural rights. We approve of these decisions as being sound law as well as good sense.

To a great extent, the statute has broken down the legal fiction that the husband and wife were one, and hence, in actions of wrong done to her property or person, she is placed upon the same plane as the husband. Under our statutes relating to the rights of married women, they can own all classes of property, and receive the rents and profits of the same, free from the control of the husband. Actions may be brought by and against a married woman in relation to her sole property in the same manner as if she was unmarried. She may also maintain actions for personal wrongs done her, and the damages

received would belong to and be her personal property. She is not liable for the debts of her husband, nor is the husband liable for any debts or contract of the wife, except for necessaries furnished her after marriage. The whole tenor of our statute relating to the rights of a married woman shows the tendency to abrogate the common-law unity of husband and wife, and, if the common law ever stood in the way of her maintaining an action of this kind, she has, by statutory enactments, been emancipated from its thraldom, and stands upon grounds more in accord with enlightened thought and natural justice. Upon reason, a wife ought to be entitled to maintain such an action.

"To entice away or to corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. * * * The gist of the action, however, is not the loss of assistance, but the loss of the 'consortium' of the wife or husband, under which term is usually included the person's affection, society, or aid."

Bigelow, Torts, 153.

In note 2, p. 267, of Cooley on Torts (2nd Ed.), the author says:

"We see no reason why such an action should not be supported where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her; and it is held she may maintain an action in her own name for alienating the husband's affections and causing a separation,"—citing authorities.

As long as the plaintiff kept her marriage contract, she was entitled to the husband's conjugal society, and to her marital rights under that contract. If the husband violated this contract, the wife had a right to know the reason therefor. Her marriage gave her this right. She was entitled to his companionship, affection, care, and protection. She broke no vows of her own. Faithful in her marriage relations, she found herself deserted in early married life by a husband through some malign influences; and, cast upon the world without a husband or home, she appeals to the law for redress. Why should she not have a right of action for the wrong she thus suffers as well as the husband if her affections had been alienated from him? His society was of value to her, springing from the marriage contract, and from it she was entitled to the protection of the law. For the injury which she has suffered she has a remedy, and that remedy consists in her right to maintain an action at law against the prime movers in perpetrating this wrong against her marital rights. In support of these views, see Clow

v. Chapman, 125 Mo. 101, 28 S. W. 328; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, overruling Logan v. Logan, 77 Ind. 558; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17; Warren v. Warren, 89 Mich. 123, 50 N. W. 842; Foot v. Card, 58 Conn. 1, 18 Atl. 1027; Price v. Price, 91 Iowa, 693, 60 N. W. 202.

It is further contended by the defendants that whatever they said or did in relation to the separation of the husband and wife, or their domestic difficulties between them, was merely the exercise of a parental privilege of advising them, and that the law presumes the motive of the parents in such case to be good until a contrary motive is made to appear; and that when such advice is given in good faith and results in a separation the act does not give the injured party a right of action against the parents. Conceding, without deciding, such to be the law, yet such relationship and conduct on the part of the parents would not excuse willful, malicious, and deliberate acts upon their part which result in or contribute to the separation. The plaintiff's husband was a man of mature years when he married plaintiff, and had known her for several years previous to the marriage, and the defendants had also known her quite intimately for at least three years prior to the time of such marriage, and at that time seemed to be pleased that their son had married the plaintiff; and during the time they lived together as husband and wife her conduct had been exemplary, and has so continued. What motive, then, inspired the defendants in the course of conduct which they have pursued towards this plaintiff? There were no serious domestic difficulties between plaintiff and her husband previous to the time of their separation. No question of immorality, property rights, or social discord leading to their separation is to be found in the record. On the contrary, we find a husband separating from a pure wife, after living with her only ten months, giving no reason or excuse for his faithless conduct, leaving her homeless and at first penniless, neither seeking nor permitting any reconciliation, and not having either the courage or manliness to defend her when abused or insulted. Such conduct needed explanation. The jury doubtless found it in the conduct of the defendants. It is true they denied it generally and specifically, but the jury found against them and for the plaintiff.

But the case was not tried upon the theory that the defendants were exercising a parental right in advising the son as to any domestic trou-

bles, or that they had attempted any reconciliation between the plaintiff and her husband. The defendant John E. Lockwood testified:

"We lived the same as any family. Everything was pleasant and agreeable in the family, and it was one family in reality. There were no jars and no disagreeable talk, or anything of the kind, during the whole time that I knew the plaintiff, not one, from the time that she was my son's wife. From the time I first knew her up to that time, everything was pleasant and agreeable at the house."

He again testified that on September 26, 1895, when plaintiff, in her distress, complained to him of her husband's conduct on that and the previous day, he answered her as follows:

"Mae, I don't know anything about your affairs. I am old enough and I know enough not to interfere between a man and his wife."

The defendant Mattie Lockwood testified that there had been no trouble, fuss, or disagreement of any kind until September 25, except a little difference of opinion about a mutual friend which was by her regarded as of little consequence. It quite conclusively appears from the record that there were no domestic troubles or difficulties between plaintiff and her husband which required any parental advice from the defendants, and as none was needed none was given; and hence the contention of counsel that the defendants in this case had a legal right to give such advice to their son is farfetched and without any grounds for the application of the rule, if such a one exists in law.

2. The question now arises, was the conduct of the defendants, as developed by the evidence, of such a character and sufficient to justify the jury in finding that it had caused the alienation of the affections of Edwin L. Lockwood from his wife, this plaintiff, and his consequent separation from her, and her loss of his conjugal society? The plaintiff in her complaint, in addition to certain other allegations therein, charges as follows:

"That soon after said marriage, and after said Edwin L. Lockwood had taken this plaintiff to said defendants' home, and made the same his home and the home of this plaintiff, for the reason and as hereinbefore alleged, and at once after said defendants formed said agreement and conspiracy as hereinbefore alleged, said defendants, by reason of said agreement and said conspiracy, and to execute and carry out the same, jointly and severally, wrongfully, maliciously, unlawfully, and wickedly behaved and conducted themselves continuously until September 26, 1895, towards this plaintiff in an unkind, unsociable, cruel, and inhuman manner, thereby gradually undermining and destroying this plaintiff's happiness, peace of mind, and health, said

conduct and behavior of said defendants towards this plaintiff continually growing worse and more cruel; and by reason thereof said plaintiff's health and happiness became gradually more undermined and destroyed, until on the 26th day of September, 1895, when, solely by reason of said conduct of said defendants towards her, in conjunction with the conduct of said Edwin L. Lockwood, her husband, towards her, as hereinafter alleged, this plaintiff's health was entirely destroyed, and she was at said time, in her said home, and in the home of her said husband and of these defendants, dangerously sick, confined to her bed, and under the care of her physician.

"That during the whole time during which said defendants behaved themselves towards this plaintiff as hereinbefore alleged, which produced the effects upon this plaintiff as hereinbefore alleged, by reason of, in pursuance of, and in execution of said agreement and conspiracy, said defendants wrongfully, wickedly, unlawfully, and maliciously, jointly and severally, and continuously until the 26th day of September, 1895, enticed, induced, begged, persuaded, and urged said Edwin L. Lockwood to deprive this plaintiff of all the things which, as hereinbefore alleged, it was the duty of said Edwin L. Lockwood to furnish to this plaintiff as his wife, and to abandon and desert her, and to live apart from her, and to refuse to live with her, and to neglect her and drive her away from his and her said home and the home of these defendants, and to compel her to continuously remain away from her said home, and for himself to remain and live with themselves alone, as he had done before said marriage, as hereinbefore alleged."

According to the plaintiff's testimony, the first open exhibition of anger on the part of defendants to plaintiff was when her husband bought an expensive ring for her, in the month of March, prior to the time of their separation. At that time defendants treated her coldly, and did not speak to her that day. Soon after, Mattie Lockwood made some criticisms upon a friend of plaintiff, whom she defended, and thereupon Mattie Lockwood jumped up from a chair near the table where she was sitting, went near the plaintiff, and shook her fist in the plaintiff's face, and did not speak to her or her husband for two days. When plaintiff expressed regret that anything unpleasant had taken place between them, and that, rather than have such trouble, she thought she and her husband had better go by themselves, the defendant Mattie Lockwood, in the presence of all the parties, charged plaintiff with trying to separate her husband from his people, to drag him down and take him away from their beautiful home, and that plaintiff was the most ungrateful person she ever knew.

Plaintiff further testified that from that day the defendants began to treat her with perfect disdain; that they would never ask her to

go out to ride with them, and would never offer her the carriage; that they would go to her husband about everything, and make a fuss about everything she purchased; that every attention showed her by her husband made them angry, and when he was not present they would openly insult her, and did not wish to know anything about her or her friends; and that when she and her husband started on a pleasure trip to Boston they did not bid them good-bye, and that Mattie Lockwood was very angry about their going, and charged plaintiff with being responsible for her husband's taking the trip; and that she did not welcome them on their return.

On September 26, after Edwin L. Lockwood had left the house in anger towards plaintiff, and without any apparent cause, the plaintiff had an interview with the defendant Mattie Lockwood, and plaintiff testified that the following proceedings took place between them:

"Q. You may state the conversation you had with her." "A. I said: 'Mother, what does this mean? Has Ned gone crazy?' 'Why,' she says, 'haven't you ever heard of a husband and wife separating?' 'Yes,' I said, 'but those were cases where there was trouble between the husband and wife; not where the husband had to live in a home, and the wife was turned out.' And she says: 'This is Eddie's home, and I am miserable with you here. You are sick half of the time, and you don't seem to be happy here.' And I said: 'Happy! How can any one be happy, in the manner in which I have been treated in this house?' And she says: 'If I had been you, under the circumstances in this house, I would have acted more independent, and gone long ago.' She says: 'Well, Mae, under the circumstances, if I had been you, I would have acted more independent, and gone long ago.' And I said: 'Ned is my husband, just the same; and, if I go, he will have to go with me.' And she said: 'Your husband only as the law makes him support you. We know he will be obliged to support you, but he will only be obliged to give you necessaries; and, if you want anything more, you will have to go to work.' And I said: 'If he stays, I will have to stay.' And she says: 'Why, he has cast you from him. Your rooms are already separate. You can never go any place together, and we are going to tell everybody right away that you are separated. And just think what will be our relations if you stay; when you come to the table, no one will speak to you, and, if you go to having any more of your imaginary sickness, no more doctors will come here to see you and run up bills for Eddie to pay. I can say to you that this is my house, and you can simply stay here until you find a boarding place and decide what to do. There is no use of my discussing the matter any further, as it was all decided last night between Eddie and us.' That is what she said. * * *

"Mr. Welch: What was that last that she said? A. She said that it was all decided last night, and nothing that you can do or say can

make it any different. Eddie is to live with us. Q. State any further conversation. A. She says: 'You know you can't get a divorce. There will be no publicity about it, and, if I were you, I would go out of the city.' And I said: 'This from you! You, a mother and a Christian woman!' I said: 'This from you, a mother and a Christian woman!' She was very angry, and said she would go to the kitchen, where she could be protected from any such crazy talk. I said: 'What will become of me? I am in no condition to be turned out,' and she says: 'Who cares anything about your condition, or you, any way? You are getting your pay now for influencing Eddie to marry you without our consent,' she says, 'and the sooner you get out of this house the better.' She says, 'The most unhappy hour in our life was when we heard Eddie was married.' I pleaded with her, and tried in every way—

"Q. Proceed and state anything further. A. I told her that my husband was not himself, that he was drinking, and that he didn't realize what he was doing. And she says: 'I guess you will find out he is himself, when you find out all he has done.' Then I tried to plead with her; if she had any influence over him, if she would not say something to him. And I said: 'It would not only ruin my life, but his.' And she said she guessed he would get along all right, that he got along all right before he ever saw me, and she guessed that he wished he had never even seen my picture, a great many times. Q. Well, was that substantially all that passed between you? A. It was. Of course, there was more to it. I went up to her and tried to plead with her, and she wouldn't have it at all, and pushed me away from her, and said she wanted to hear nothing more about it; that I was just setting her crazy with my talk. And I said, 'What do you think of me?' and she says, 'Oh, who cares anything about you;' and with that she went to the kitchen. * * * She also said,—here is one thing that I forgot,—in response to my pleading to her— I said I had no home and no place to go to, and I thought he was pledged to me and it was his duty; and she said she didn't see how I could expect him to do it. She says: 'It would be very different, Mae, if he had taken you from your home, or if you had anything to bring him; but you had nothing, and I don't see how you can expect him to take you, or even ask you.' With that, I asked her if my love for my husband was nothing, and if the wife had no rights; and she said, 'In some cases, but not in this.'

"Q. After that interview closed, you went up to your room? A. I went up to my room, and lay upon the bed a little while. I was perfectly exhausted, and was shaking so that I could hardly stand. I felt so weak I was perfectly overcome, and I lay down upon the bed, and didn't know what to do. Then I hastily threw myself into something. My one thought was to go to some human being, some one to say one kind word— Q. You left the house? A. Yes, sir. Q. How were you appareled. A. Just as I was in the morning, except that I changed my dress skirt and put on a little light wrap. The weather had turned very much colder. I didn't know that, of course, as it was

warm in the house; and I nearly froze, for I had on that day just a shirt waist and a skirt. Q. Where did you go? A. I got to the car and went over to the physician's, Dr. Roberts."

The conduct of the defendant John E. Lockwood was very much in the same line as that of his wife. Notwithstanding the letter which he wrote to plaintiff and her husband on the day of their marriage, he testified on the stand that he never liked the plaintiff; that the makeup of her jib was not right, and he never had any love or respect for her. Plaintiff was very sick the night of September 25,—unable to sleep at all, by reason of her husband's conduct and that of the defendants, the husband not going to her room when she was sick, nor did the defendants visit plaintiff that night or assist her in any way. The next morning, on going to the library, the defendants and her husband were there; and when she attempted to caress him he pushed her away, and the others, when spoken to, did not answer at first. Plaintiff said to defendant John E. Lockwood: "I appeal to you. What is the matter?" And he answered:

"My son can tell you after dinner what the matter is. He is of age now, and he was of age when he married you without my knowledge or consent. And, if he had asked my consent, he wouldn't have got it. I consider you [he used a profane word there] a fool and adventuress. If we can prevent it, my son won't live with you another day."

John E. Lockwood then asked plaintiff's husband if he was going to see his lawyer before he came to the office. Mattie Lockwood was present at this time. The plaintiff's husband soon after left the house, without bidding plaintiff good-by, and during the afternoon plaintiff also left defendants' house. No assistance was given plaintiff that day, although she was very sick with nervous chills. During all these times to which we have alluded, not a word of attempted reconciliation appears to have been uttered by these defendants or plaintiff's husband. It appears rather to have been a willful and deliberate attempt on the part of defendants to cause an alienation of Edwin L. Lockwood's affections for his wife, and, if possible, a separation between them, and to cause him to abandon and desert his wife.

This conduct on the part of the defendants was followed by an attempt on the part of the defendants, at the trial, to show by Dr. Roberts that, on September 26, plaintiff was crazy, evidently to break the force of her evidence against them. But their treatment of her on that occasion was so much at variance with his theory of insanity that

it may have had its influence, more or less, upon the minds of the jury. To charge plaintiff with being an adventuress, and threaten her with separation from her husband and consequent loss of his conjugal society, even if her mind was somewhat affected by the trying ordeal which she was passing through, constituted an element of wrongdoing which lay at the very foundation of the right of plaintiff to maintain this action. In the absence of proof of any care, sympathy, or attempt at reconciliation on the part of defendants at such time, when her condition would the most strongly appeal to their sense of duty and justice, the jury doubtless considered the question of whether defendants' conduct was not malicious, and acted accordingly.

3. The next question relates to the admission of the plaintiff's evidence, and it is argued by defendants' counsel that such evidence was inadmissible, under G. S. 1894, § 5662. That section has no application to the case under consideration. The gist of this action is against third parties, for the wrong done by them in bringing about a separation between plaintiff and her husband. It is true the conduct of the husband is involved, but the gravamen of the allegation in the complaint is that his misconduct was caused by the defendants as the moving parties in this wrongdoing. While the husband may have been guilty of separating from and abandoning his wife, and thus perpetrating a great wrong, yet it may have been done entirely through the malicious conduct of the defendants. The actual fact that he had left her, did not live with her or provide a home for her, and that she had entirely lost his conjugal society, were all actual, material facts in the case, to which she had a right to testify; and giving such testimony in an action against third parties does not come within the prohibition of section 5662, as being an examination against her husband, nor an examination as to any communication made by him to her during the marriage relation. The testimony did not relate to conversations between the plaintiff and her husband, nor was she being examined in any action to which he was a party.

It is further contended by the appellants that the trial court erred in admitting the declarations of the plaintiff's husband, Edwin L. Lockwood, made to the witness Bishop about half past 2 o'clock on the afternoon of September 26, that he, Edwin L. Lockwood, had decided to separate from his wife. The fact of such separation was made an issue by the pleadings, but the defendants did not, by their evidence

or any testimony introduced by them, undertake to show that the husband had not withdrawn his conjugal society from his wife. In fact, the testimony was so overwhelmingly conclusive upon this point, outside of this declaration, that, even if inadmissible, it would be error without prejudice. But was it error? The general rule is that the declarations of a person not a party to the suit are incompetent evidence, except under special or peculiar circumstances.

In Williams v. Williams, 20 Colo. 65, 37 Pac. 614, it was held by the supreme court of Colorado that such declarations made to the wife herself were admissible, but here they were made to a third person. While the husband was not a party to the suit, his own conduct, as influenced by that of the defendants, was directly in issue. The evidence was not offered to bind or affect the husband's interests or rights in any case where he was a party litigant, but to show an accomplished fact, resulting from the defendants' wrongful conduct or influence upon him in separating him from his wife. The evidence, in connection with that which we have quoted in this opinion in relation to the plantiff's husband separating from her, was proper to be submitted to the jury, as it was almost coeval with some of their acts of wrongdoing at the time of the separation, and might be properly regarded as a part of the res gestæ. Some authorities hold that the declarations of the husband in such actions as to the reasons for separation are admissible, but here the only declaration was that he had decided to separate from his wife, without giving any reasons for so doing. Baker v. Baker, 16 Abb. N. C. 293; Remsen v. Hay, 14 Wkly. Dig. 443.

Appellants' counsel further contends that it was error in the trial court to refuse defendants the privilege of rebutting this evidence by that of the husband himself. The answer to this contention is that they did not offer to rebut this declaration alone, but attempted to introduce the husband to testify against the wife generally, on any ground, which was excluded by the court. Moreover, he had strenuously, throughout the entire trial, opposed the wife's testifying to any statements or admissions of her husband, and they were excluded by the court at his request; and appellants' counsel expressly stated, when offering the husband as a witness, that he did not expect he could testify.

Another error assigned is that the trial court erred in admitting evidence of the plaintiff that the defendant Mattie Lockwood was averse

to plaintiff having children. If this defendant was scheming for a separation of her son from plaintiff, her attempt to prevent plaintiff having children by defendants' son would be proper, in showing the animus or motive in the plot to accomplish her purpose. Children constitute one of the strongest ties that bind the husband and wife to each other. This fact the defendants doubtless fully realized, and well knew how much more difficult it would be to accomplish a separation if a child or children related to them by consanguinity was to be turned out into the world with a mother, homeless, and without a husband to aid her when sick or in distress. It was therefore a link in the chain of evidence, in connection with her other conduct towards plaintiff and her husband, and showing a motive and intention upon this question of separation.

The remaining question raised by the appellants relates to the admission of certain evidence showing that the plaintiff had a miscarriage about two months subsequent to the time that her husband separated from her, and that plaintiff's condition subsequent to such separation caused by the wrongful conduct of the defendants predisposed her to a miscarriage. The uncontradicted evidence, admitted without objection, showed that, immediately after her husband separated from her, she became very pale, weak, nervous, and frequently was unable to stand, and was very much excited, agitated, and sick. She also testified, without objection, that, from the time of such separation to the time of the miscarriage, she was in a miserable condition, nervous all the time; that she did not sleep one hour during each night; that she was very sick; that she suffered both mentally and physically all the time, on account of her condition and the trouble which she was having. While in this condition she had a miscarriage, and the evidence of a physician tended to show that such existing condition on her part through such period of two months might predispose her to a miscarriage. This was competent evidence, as tending to show the effect of defendants' conduct upon her health, and was proper for the consideration of the jury, in case they found that the miscarriage was the direct result of such conduct, upon the question of damages, in connection with the willful misconduct of the defendants in alienating the husband's affections from his wife and causing him to separate from her.

While the damages are seemingly large, yet, as the conduct of the defendants appears to have been willful and malicious, we cannot hold that they are excessive, or that the verdict was the result of passion, partiality, prejudice, or improper influences on the part of the jury.

The order denying the motion for a new trial is therefore affirmed.

CANTY, J. I cannot concur in that part of the foregoing opinion which discusses the question whether a wife is entitled to maintain an action for alienating her husband's affections. The opinion fails to notice the case of Kroessin v. Keller, 60 Minn. 373, 62 N. W. 438, and the language used is broad and sweeping enough to overrule that case. In my opinion, the wife cannot, either at common law or under our statute, maintain an action for adultery with her husband. Our statutes should not be construed as attempting to unsex the husband, or to give a cause of action for the seduction of him who is nearly always himself the seducer or aggressor. But in my opinion an action may, under those statutes, be maintained by the wife for enticing away the husband and inducing him to abandon her. I concur in the other portions of the opinion.

MITCHELL, J. I concur in the result arrived at in the opinion of the court, except that I think the damages awarded were clearly excessive. The extracts from the evidence quoted in the opinion tend to clothe the case with a good deal of sentiment, and to present the conduct of the defendants in a most unfavorable light. But there is an atmosphere about the case which can only be fully felt and appreciated by reading the entire record. While it perhaps fairly appears that the defendants were never fully satisfied with their son's marriage to the plaintiff, yet I can discover no evidence that they ever contrived or contemplated bringing about a separation between them until after the difficulty arose between the parties themselves shortly before the separation took place. The most that I think the evidence tends to prove is that, after this quarrel or misunderstanding took place, the defendants, instead of attempting to bring about a reconciliation, availed themselves of the opportunity to bring about a separation with a view to the subsequent dissolution of a marriage with which they had never been entirely satisfied. It is both impracticable and useless to discuss the evidence, but the conclusion at which I have

arrived from an examination of the whole of it is that the case was not one justifying any considerable amount of merely punitive damages, and that the amount of the verdict is very far in excess of plaintiff's actual damages. On the point referred to by Justice CANTY, I may add that I fully agree with him in the distinction which he makes between this and the Kroessin case, and that I do not think any member of the court intended to overrule or modify the doctrine of that case.

SEAVER E. OLSON v. CARL C. SCHULTZ.[1]

April 13, 1897.

Nos. 10,380—(268).

Freight Elevator—Liability of Landlord.

Where a portion of a building is let, and the tenant has the right to the use of the elevator in common with the landlord and the other tenants, such elevator to be operated by the tenant when required by his business necessities, and the landlord expressly covenants in the lease that he will keep the elevator and approaches in constant repair and in perfect condition for the lessee's use, and the landlord retains the general control over the elevator and its approaches, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of the elevator.

Same—Sufficiency of Evidence.

Evidence considered, and *held* that the lessee's agent did not have sufficient notice of the unsafe condition of the elevator to create a liability on the part of the lessee as being guilty of contributory negligence.

Appeal by defendant from an order of the district court for Hennepin county, Elliott, J., refusing a new trial after a verdict for $500. Affirmed.

Choate & Merrill, for appellant.

A lessor who agrees to repair cannot be charged with a breach of the agreement without notice of need of repairs. Moore v. Clark, 5 Taunt. 90, 95; Holton v. Waller, 95 Iowa, 545, 64 N. W. 633; Wolcott

[1] Reported in 70 N. W. 779.

v. Sullivan, 6 Paige, Ch. 117; Cooke v. England, 27 Md. 14; Ploen v. Staff, 9 Mo. App. 309; Taylor, L. & T. § 330; Wood, L. & T. (2d Ed.) § 374; 3 Sutherland, Dam. § 873. But in the present case the language of the lease contemplates notice.

In the absence of any agreement to the contrary the rule of damages is either the cost of repair by the lessee, or the difference in value in the use of the premises between the condition in which they are and that in which they were to be put. Long v. Gieriet, 57 Minn. 278, 59 N. W. 194; Arnold v. Clark, 13 Jones & S. 252; Cook v. Soule, 56 N. Y. 420; Blanchard v. Ely, 21 Wend. 342, 347; Dorwin v. Potter, 5 Denio, 306; Sparks v. Bassett, 17 Jones & S. 270; Sedgwick, Dam. § 148; Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Flynn v. Hatton, 43 How. Pr. 333; Thomas v. Kingsland, 12 Daly, 315; Leavitt v. Fletcher, 10 Allen, 119; Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49.

Negligence of plaintiff is a bar to recovery of any damages resulting from his negligence. Thomas v. Kingsland, 12 Daly, 315; Ploen v. Staff, supra, 311; Flynn v. Trask, 11 Allen, 550; Cook v. Soule, supra; Hamilton v. McPherson, 28 N. Y. 72; Sedgwick, Dam. §§ 201, 202, 204; Flynn v. Hatton, supra; Parker v. Meadows, supra.

J. F. McGee, for respondent.

The judgment in Lyman v. Olson is conclusive: (1) that the elevator was in an unsafe condition; (2) that Lyman was injured by reason of such condition while in the exercise of due care, and (3) that he sustained damages to the amount of $500. Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62; City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; City of St. Joseph v. Union Ry. Co., 116 Mo. 636, 22 S. W. 794; Davis v. Smith, 79 Me. 351, 10 Atl. 55; Kip v. Brigham, 6 John. 158; Beers v. Pinney, 12 Wend. 309; Douglass v. Howland, 24 Wend. 55; Thomas v. Hubbell, 15 N. Y. 405; Howe v. Buffalo, N. Y. & E. Ry. Co., 37 N. Y. 297; Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550; Inhabitants of Milford v. Holbrook, 9 Allen, 17; Boston v. Worthington, 10 Gray, 496; Chamberlain v. Preble, 11 Allen, 370; Prichard v. Farrar, 116 Mass. 221; Lovejoy v. Murray, 3 Wall. 1; City of Rochester v. Montgomery, 72 N. Y. 65; McNaughton v. Elkhart, 85 Ind. 384; Miner v. Clark, 15 Wend. 425; Aberdeen v. Blackmar, 6 Hill, 324; Barney v. Dewey, 13 John. 224; Swartwout

v. Payne, 19 John. 294; Chicago & N. Ry. Co. v. Northern L. P. Co., 70 Ill. 217; Veasie v. Penobscot R. Co., 49 Me. 119. The cases cited by appellant upon the measure of damages are not in point.

It is a universal rule that a person injured shall receive compensation commensurate with his damages. 1 Sutherland, Dam. § 12.

BUCK, J. On June 2, 1891, the appellant, Schultz, was the owner of a four-story brick building, with basement, situate in the city of Minneapolis; and on that day he leased the fourth floor of said building, with the privileges and appurtenances thereunto belonging, to the respondent, Olson, for a term of one year, to commence July 1, 1891, for the rental of $50 per month. The third floor of the building was unoccupied, and the remainder of the building was occupied by the North Star Boot & Shoe Company, with equal right to use an elevator in the building in common with the respondent, Olson. This elevator ran from the basement of the building to the top floor, and, when the necessities of each tenant required its use, he furnished his own operator. All the machinery connected with the operation of the elevator was in the basement of the building, except that part of the cable which was in the shaft and overhead the pulleys. Olson leased and used the fourth floor for the purpose of manufacturing overalls and light clothing, and, in connection with this business, used this elevator in carrying freight. The lease, which was in writing, contained a provision,

"The lessor is to keep the elevator and approaches in constant repair, and in perfect condition for the lessee's use: provided that, if said premises shall have become untenantable without the fault of said lessee, then in that case said lessee shall be released from the obligation of this lease, unless said lessor, after receiving seasonable notice from said lessee, cause said premises to be repaired and put in suitable condition for occupancy within a reasonable time after receiving said notice."

It was also further provided by the terms of the lease that "the lessor may enter at any and all times to view and make improvements and suitable repairs." During the term of the lease the third floor of said building, although unoccupied, was under the control of the defendant, Schultz, and during said term there was a hall and stairway running from the street to the fourth story of said building. On January 12, 1892, one Lyman, an employé of respondent, who operated the elevator when it was used by respondent, had used the elevator, and for

some purpose stepped from it, leaving the floor of the elevator cage even with the fourth floor of the building, and was absent for some time; and when he returned he found that the elevator platform had crept up some distance, and, when he stepped upon it, it instantly fell to the bottom of the shaft, a distance of about 75 feet, injuring said Lyman.

Afterwards Lyman brought a suit against the respondent, Olson, in the United States circuit court, to recover $5,200 damages for the injuries sustained by him by reason of the fall of said elevator; alleging that said elevator was defective, unsafe, and out of repair. Thereupon the respondent duly notified the appellant of the pendency of the action, and required him to appear and defend it, but the latter did not do so, whereupon this respondent did duly appear and defend said action, the result of which was a verdict in favor of Lyman for the sum of $500, which, with the costs and expenses of the trial, amounted to the sum of $1,038.64, which respondent paid; and he brought this action to recover from the appellant the said amount, on the theory that the failure of the appellant to perform his covenant to keep the elevator and approaches in constant repair and perfect condition for the lessee's use resulted in the accident to Lyman on January 12, 1892, and that the respondent, as master, being primarily liable to his servant, Lyman, had a remedy over against appellant on the said covenant, to recover the amount he was obliged to pay Lyman. This view of the law was sustained by the trial court, and judgment ordered by it in favor of plaintiff accordingly, and this appeal is taken from an order denying a motion for a new trial.

The counsel for the appellant has devoted considerable space in his brief to a discussion of the question of whether the elevator was out of repair on and prior to January 12, 1892, the date of the accident. We are of the opinion that this question was determined adversely to the contention of the appellant in the former action, and that the judgment entered in that action concludes the appellant herein, as that was one of the very questions litigated in that action. The complaint in the former action of Lyman v. Olson contains an allegation that the elevator was in an unsafe and dangerous condition, and unfit for use, at and for some time prior to the time of the injury to Lyman. We are also of the opinion that the question of Lyman's being injured

by reason of such defective condition of the elevator, and the amount of damages which he thereby sustained, were settled by the verdict and judgment entered thereon in the former action, and are not now open for discussion or adjudication upon the merits in this action. Schultz had due notice of the pendency of that action, and was afforded an opportunity to appear and defend, which he neglected and refused to do, and he was as effectually concluded thereby as though he had duly appeared therein and contested these questions upon the merits. City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62.

The most serious question arises upon the fifth finding of the trial court, which is as follows:

"That subsequent to the time plaintiff took possession of said premises, and some days prior to January 12, 1892, unknown to the defendant, a bolt in the arm in the top of said elevator cage, through an opening in which the steel cable used in starting and stopping the elevator passed, was lost out, so that said arm, when said elevator reached the fourth floor, would not come against the button fastened to said steel cable, but would allow the same to creep about twelve inches above said floor; but notice of the condition of said elevator was never given to the defendant, and no demand was ever made on the defendant to repair the same. That at the time of said injury, and while said elevator was out of repair, neither the plaintiff nor defendant herein knew the said elevator was out of repair. That plaintiff's factory in said building was under the charge of Mr. Shotwell, who was the manager of said factory on behalf of the plaintiff, and, as such manager, had charge of all the operations carried on by plaintiff in said factory, and of all the workmen employed therein. That said Shotwell, for several days prior to the injury suffered by Lyman, had notice that said arm was out of repair as above stated. That the plaintiff was not in immediate supervision of said factory, and visited the same but two or three times during the term of said lease. That the absence of said bolt or of the arm would not affect the operation of the elevator, or cause it to fall, if the guide strips, being maple strips two by two inches, which should run from the bottom to the top of the elevator shaft, had been properly constructed so as to run to the top of the shaft, thereby preventing the elevator shoes which operate on said guides from getting off the guides and 'hanging up' the elevator cage, by reason of said shoes getting on the top of said guides. That said guide strips did not run to the top of the elevator shaft, but stopped some distance below that point."

In order to determine upon whom the liability rests in this action we may properly consider three points: (1) Who had control and

possession of the elevator and the machinery necessarily connected with its operation, and the right to make constant repairs and keep it in perfect condition for the lessee's use? (2) Was it the duty of the lessor, under the covenants in the lease, to keep the elevator in constant repair and perfect condition, irrespective of the question whether he had notice of its being out of repair? In other words, was he liable for injury resulting from its being out of repair without his having knowledge of such defect? (3) Was Shotwell's notice of the defective condition of the elevator sufficient to charge plaintiff with contributory negligence, in not giving notice thereof to defendant?

The only control or possession which plaintiff had over the elevator was that his operator might stand upon the platform while operating it in carrying plaintiff's merchandise. The other tenants had the same right. So far as appears from the record, the entire machinery connected with the operation of the elevator was under the management and in the possession and under the control of the defendant. The premises designated in the lease as those rented are "the fourth floor of the four-story brick building known as being 'Numbers 121 and 123 Washington Avenue North.'" The elevator was not leased to Olson, but only its mere use during such time as he needed it to convey his merchandise either up or down. At other times the North Star Boot & Shoe Company or the defendant had a right to its use. Olson's control of the elevator was a mere easement or right to transport his goods back and forth as his necessities occasionally required. It does not appear that the other tenant had any greater right in the elevator.

As the defendant was the owner of the building and elevator, and the third story not rented, the presumption is that he had the absolute control and possession of the elevator at all times, subject only to the tenant's right of carrying goods as above indicated. Hence he had the legal right and the actual opportunity to make all necessary repairs and keep the elevator and its machinery in perfect condition, irrespective of the covenant and reserved privilege in the lease to do so. Olson had no right and was under no legal obligation to repair the elevator. He had no right to go to the basement or other stories for the purpose of repairing it, nor, as against other tenants, to stop its running for such purpose.

His right to its use was not exclusive, but a right of passageway in common with the other tenant and the landlord, the latter having gen-

eral control over the elevator; and we are of the opinion that the leasing of the fourth story of the building, under such circumstances, does not exonerate the defendant landlord from responsibility for the safe condition of the elevator under the specific covenant in the lease. It was put there for a specific purpose. The evidence shows the necessity for keeping it in this condition to enable the lessee to carry on his business, and to guard against injury to persons lawfully using it. And this covenant applies to the condition in which the landlord was to keep the elevator during the term of the lessee's lease. It did not concern the lessee as to the condition of the elevator at the date of the lease, June 2, 1891, but it was of vital importance to him as to its condition during the year for which he rented the premises, commencing July 1, 1891.

There is no merit in the contention of appellant's counsel that the elevator was to be kept in the same condition as when the lease was executed. Such a construction is not within the spirit or language of the lease. To keep an elevator and approaches in constant repair and perfect condition for the lessee's use does not mean that it may be in a defective and unsafe condition at the commencement of the lessee's term, and that it may be permitted to remain so, continually endangering human life. If it was not in repair and perfect condition, it was the duty of the landlord to put it in that condition at or before the commencement of the lease, and keep it so during the term. Myers v. Burns, 35 N. Y. 269–271.

Nor was it necessary to show that the defendant had actual knowledge of the defect. His duty was that of care, and ignorance of the defect was no defense. Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, and cases there cited. This obligation is the result of an express contract between the parties; the landlord reserving to himself the control over the elevator, and the right and obligation to repair it and keep it in repair, and the lessee having no control over it except at times when he was occasionally actually using it. The right to use the elevator had been divided by the landlord among different tenants and himself for the purpose of making money for himself, and for this purpose he had made a passageway common to all, as an inducement and accommodation to those leasing the premises; and the tenant, under the contract, was not bound to repair, but the landlord, by an express contract, had agreed to do so. If we should apply the

rule as settled in some jurisdictions, that the obligation to repair depended upon the right of possession, the defendant would still be liable; but, in addition to this liability, there is one by express contract. In the case of Looney v. McLean, 129 Mass. 33, it was ruled that:

"Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair. As to such portion he still retains the responsibilities of a "general owner to all persons, including the tenants of his building." The case shows that the plaintiff had a simple right of access to the shed over this staircase, as incident to her occupation of the premises leased to her. The duty of the defendant, having still the possession and control of the same, was to protect her from injury in that right, by the use of reasonable care on his part. The stairway was apparently intended to furnish a passageway for her use, and the defendant is responsible for injuries received by one entering upon the same by his invitation or procurement, express or implied. Sweeny v. Old C. & N. R. Co., 10 Allen, 368; Elliott v. Pray, 10 Allen, 378. The fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care. Whittaker v. West Boylston, 97 Mass. 273; Reed v. Northfield, 13 Pick. 94."

In the case at bar it is conceded that Olson had no actual notice of the defective condition of the elevator, and his right of action is challenged upon the ground that Shotwell, the manager of Olson's factory, knew that the elevator was out of repair, and that such knowledge on the part of Shotwell is in law imputable to Olson, and, hence, that Olson's contributory negligence precludes his recovery against Schultz. But the failure to bind Olson in this respect rests upon the insufficiency of the finding of facts. Shotwell was the manager of the factory and its operations, and in charge of the workmen employed therein, but not of the elevator. It nowhere appears that he had any control, possession, or management over the elevator or over Lyman, who operated it occasionally.

The finding of fact by the trial court is that Shotwell knew that a bolt in the arm of the elevator case, through an opening in which the steel cable used in starting and stopping the elevator passed, was lost out, so that said arm, when the elevator reached the fourth floor, would not come against the button fastened to said steel cable, but would allow the same to creep about 12 inches above said floor. This is

the extent of Shotwell's knowledge or notice of any defect in the elevator. This alone was not the cause of the injury to Lyman, nor did Shotwell know or have reason to believe that this condition of the elevator was dangerous, in its use, either to person, life, or property. In fact, the trial court found that the absence of said bolt or the arm would not affect the operation of the elevator, or cause it to fall, if the guide strips (being maple strips two by two inches) had been properly constructed so as to run to the top of the shaft, thereby preventing the elevator shoes which operated on the guides from getting off the guides and hanging up the elevator cage by reason of the shoes getting on top of the guides, and that said guide strips did not run to the top of the elevator shaft, but stopped below that point.

Shotwell did not have the slightest knowledge or notice of these facts, the existence of which constituted the primary cause of the injury, and were evidently defects which existed in the original construction of the elevator, and chargeable to the owner of the building. Such being the case, the owner is presumed to know of these defects, and notice thereof need not be given him, to render him liable. Certainly, a tenant who has no knowledge of such defects, and is not bound to know them, is not chargeable with negligence in not giving the landlord notice thereof. The facts therefore fail to show any knowledge upon the part of Shotwell, as manager of Olson, which could be imputed to the latter, and conclude him from maintaining this action, upon the ground of contributory negligence.

Some controversy has arisen upon the phraseology found in the original lease, which we have examined, and have no hesitation in saying that the notice therein required to be given by the lessee in case the premises became untenantable relates to the fourth floor, rented for business purposes, and not to the elevator; and the covenant to keep in constant repair and in perfect condition relates only to the elevator, and binds the landlord to keep it in that condition, without notice being required on the part of the lessee of any defects existing therein.

Our conclusion is that the order denying the motion for a new trial should be affirmed, and it is so ordered.

CANTY, J. (dissenting). I cannot concur in the majority opinion in this case. Defendant's covenant did not, in my opinion, make him an insurer of the safety at all times of the elevator. He was liable

only for failure to exercise proper care in keeping the elevator in repair. If plaintiff had exclusive possession of the elevator, defendant would not, under the authorities, be liable until after he was notified of the necessity for repairs. But plaintiff did not have possession at all. On the contrary, defendant had possession, and it was the latter's duty to use reasonable care and diligence to discover the want of repair. This the evidence tends to prove he did not do. There is evidence to sustain a finding that defendant was guilty of negligence which caused or contributed to the injury for which plaintiff was compelled to pay damages, and defendant is therefore liable over to plaintiff, unless the latter is guilty of contributory negligence. In my opinion, the plaintiff's foreman was guilty of negligence which contributed to the injury; and, on the doctrine of respondeat superior, plaintiff is responsible for this negligence. The trial court found:

"A bolt in the arm in the top of said elevator cage, through an opening in which the steel cable used in starting and stopping the elevator passed, was lost out, so that said arm, when said elevator reached the fourth floor, would not come against the button fastened to said steel cable, but would allow the same to creep about twelve inches above said floor. * * * That plaintiff's factory in said building was under the charge of Mr. Shotwell, who was the manager of said factory on behalf of the plaintiff, and, as such manager, had charge of all the operations carried on by plaintiff in said factory, and of all the workmen employed therein. That said Shotwell, for several days prior to the injury suffered by Lyman, had notice that said arm was out of repair as above stated."

The further findings of the court show conclusively that this arm, being out of repair as above described, was one of the concurring causes resulting in the fall of the elevator and the injury of Lyman. As regards the matter in question, Shotwell was as much the representative of plaintiff as it was possible for him to be, and therefore notice to him was notice to plaintiff. He not only had notice that the bolt had fallen out of the arm, but notice "that said arm was out of repair as above stated," which includes notice that the arm would not stop the elevator at the proper place, "but would allow the same to creep about twelve inches above said floor." It is true that the court finds that the defective condition of this arm would not have caused the elevator to fall, were it not for the defective condition of the guide strips, which were too short to reach as high as the elevator might ascend when the automatic stop did not act. But this is merely find-

ing that the defective condition of the arm and the defective condition of the guide strips each contributed to cause the fall and the injury. If plaintiff (through Shotwell) was guilty of negligence which contributed to the injury, it is no excuse to say that, as respects other parts of the appliance (to wit, the guide strips), defendant was guilty of negligence which also contributed to the injury.

Again, it does not appear that Shotwell knew that the guide strips were too short, and that the guides would get off the guide strips by reason of the defective condition of the arm, and thereby cause the elevator to fall. But Shotwell had good reason to know, and must be held to have known, that the defective condition of this arm made it dangerous, and was likely to result in some kind of an accident. That he did not know and could not anticipate the particular accident which occurred, makes no difference. The rule of Hadley v. Baxendale, 9 Exch. 341, does not apply to such cases. While as between plaintiff and his servant, Lyman, it was plaintiff's duty to use at all times proper care to inspect and repair the appliances furnished the servant in the performance of his duties, and plaintiff could not delegate this duty to defendant, yet, as between plaintiff and defendant, it was not plaintiff's duty to inspect or repair the appliances in question, but it was defendant's duty to do both. Therefore, if, by reason of the failure of plaintiff to use proper care in inspecting and repairing this elevator, his servant was injured, and he was compelled to pay the servant damages therefor, defendant would be answerable over to plaintiff for what he paid. Because what was plaintiff's duty, as between him and his servant, was defendant's duty, as between him and plaintiff.

But this is not the question here. Here the plaintiff is charged with something more than a failure to inspect and discover the defect in question. He already had notice of that defect, and, notwithstanding such notice that the elevator was dangerous, he permitted his servant to use it for several days, and this resulted in the injury in question. He was, as between himself and defendant, guilty of negligence in permitting the elevator to be used after he had notice that it was in a dangerous condition, and this negligence contributed to the injury. For this reason, plaintiff is not entitled to recover. The oral evidence and admissions of the parties on the trial prove conclusively the facts found by the court, on which this result is reached.

However, respondent contends that this defendant, having received

notice to defend the action brought by Lyman against this plaintiff, is bound by the result of that action. The proceedings in that action were introduced in evidence in this, and show that one of the issues presented the same state of facts as the oral evidence and admissions above referred to, viz. that this plaintiff (through Shotwell) had notice that the elevator arm was out of repair, and would not perform its function of automatically stopping the elevator. Under this issue, the evidence that plaintiff (through Shotwell) was negligent in failing, after receiving such notice, to prohibit the use of the elevator by his servants, would have sustained a verdict in Lyman's favor in that case. For this negligence this defendant was not responsible or answerable over to this plaintiff, and therefore the result of that action is not conclusive between the parties to this action.

The order appealed from should be reversed.

MITCHELL, J. I fully agree with Justice CANTY as to the legal principles applicable to this case, but am not able to concur in the construction which he places upon the finding of the trial court, as amounting to a finding that Shotwell was guilty of negligence. It is true that, according to the findings, the absence of the bolt in the arm in the top of the elevator, of which Shotwell had notice, was one of the concurring causes of the fall of the elevator. But it does not necessarily follow that Shotwell was negligent in allowing the elevator to be used in that condition. The court finds that, but for the defective condition of the guide strips, of which Shotwell had no notice, the absence of this bolt would not have caused the elevator to fall. It is no doubt true that if Shotwell knew, or ought, in the exercise of reasonable care, to have known, that the elevator was dangerous and liable to result in injury to those using it, then he was guilty of contributory negligence, although he had no reason to anticipate the particular accident which did occur. But there is no finding that the mere absence of this bolt rendered the elevator unsafe, or that Shotwell had any reason to suppose it did. The finding is merely to the effect that he knew "that said arm was out of repair as above stated." Even if this implies that he also knew that this would allow the elevator "to creep about 12 inches above said floor," this does not amount to a finding, either express or implied, that he was guilty of any negligence in permitting it to be used in that condition. Plaintiff's con-

tributory negligence, personal or imputed, was an affirmative defense, the burden of proving which was on the defendant.

For these reasons I concur in the result arrived at in the opinion of the court affirming the order appealed from.

STATE OF MINNESOTA v. MERCHANTS' BANK OF LAKE CITY and Others.[1]

April 21, 1897.

Nos. 10,335–10,336–10,337–10,338—(12–13–14–15).[2]

Bank—Forfeiture of Charter—Action by Attorney General.

The attorney general brought this action to forfeit the charter of a bank organized under the laws of this state, for failing to comply with the laws of this state, as required by G. S. 1894, §§ 2525, 2528. Thereafter, and before judgment therein, a creditor, with the consent of the attorney general, and with leave of court, intervened in the action, filed a complaint in intervention, and brought in the stockholders as defendants, for the purpose of enforcing their double liability. *Held*, the original action was brought under G. S. 1894, §§ 5900–5902 (contained in chapter 76), as well as under section 2525, and the provisions of chapter 76 apply to the action.

Same—Liability of Stockholders—Enforcement.

Held, further, the legislative intent, as expressed in sections 5903 and 5904, is to permit the attorney general to proceed to judgment of forfeiture in his action without being embarrassed or delayed by the additional litigation necessary to enforce the stockholders' liability; but this does not entitle the stockholders to immunity from such litigation during the pendency of the attorney general's action, and a creditor may, during such pendency, proceed by a separate action to enforce such liability under section 5905, or he may, with the consent of the attorney general, and by leave of the court, intervene in the attorney general's action, and proceed therein to enforce such liability, as was done in this case.

Action by the state against the Merchants' Bank of Lake City to forfeit its charter. Herman B. Kennebeck intervened, and filed a cross complaint, bringing in the stockholders of the bank, for the purpose of enforcing their double liability. Josephine Rogers Sidle, Alice

[1] Reported in 70 N. W. 803.

[2] April, 1897, term.

R. Rogers, individually and as executrix, and the Security Trust Company, as trustee, defendant stockholders, demurred to the cross complaint on the ground that it did not state facts sufficient to constitute a cause of action against them, and from an order of the district court for Wabasha county, Gould, J., overruling the demurrers, they appeal. Affirmed.

Douglas A. Fiske and *John A. Young*, for appellants.

The question whether a simple contract creditor can intervene in an action to annul a charter brought by the attorney general in behalf of the state under sections 12 and 13 of chapter 76, and make the stockholders parties defendant for the purpose of enforcing their liability, when no decree has been entered annulling the charter, is before the court for the first time.

G. S. 1866, c. 76, §§ 12, 13, 14, 15, 16, are limited in their operation to moneyed corporations of the kind described in section 12. Minneapolis Paper Co. v. Swinburne, 66 Minn. 378, 69 N. W. 144; American S. & L. A. v. Farmers' & M. S. B., 65 Minn. 139, 67 N. W. 800. These sections do not authorize the proceeding begun by the intervenor. Section 16 defines the remedy of a creditor to enforce the statutory liability of the stockholders, and makes the entry of a decree in the main action to annul the charter a condition precedent to such a proceeding. The statute having prescribed the terms upon which a creditor can intervene, those terms must be complied with, and the court cannot enlarge their scope. Sutherland, St. Const. § 238.

George H. Selover, for intervenor respondent.

CANTY, J. The defendant bank is a corporation organized under the laws of this state. In February, 1895, the attorney general brought this action to have the bank's charter declared forfeited, and for the appointment of a receiver for it, alleging in his complaint, as a ground therefor, that the president of the bank was indebted to it in a specified sum, greatly in excess of 15 per cent. of the aggregate amount of its capital stock; that the public examiner demanded that it cause said indebtedness to be reduced down to said 15 per cent. limit; that said demand was never complied with, and after the lapse of 90 days thereafter the examiner made a demand in writing upon the attorney general to commence this action. G. S. 1894, §§ 2525, 2528.

At the commencement of the action the court, on the ex parte motion of the attorney general, appointed a receiver, and by a subsequent order confirmed this appointment. The receiver qualified and entered upon his duties. Thereupon, pursuant to G. S. 1894, § 5911, an order was made and published for creditors to exhibit their claims and become parties to the action. Claims were filed aggregating $140,000. Thereupon the intervenor, a creditor of the bank, with the consent of the attorney general and with leave of court, filed a cross bill, or complaint in intervention, alleging that the corporation is insolvent, and brought in the stockholders as defendants for the purpose of enforcing their statutory or double liability. Several of the stockholder defendants demurred to the cross bill on the ground that it does not state facts sufficient to constitute a cause of action against them. The demurrers were overruled, and they appeal.

1. Appellants' first point is that the action was brought by the attorney general, not under G. S. 1894, c. 76, but under section 2525, and that, the action not being brought under chapter 76, the provisions of that chapter for enforcing the stockholders' double liability do not apply, and do not authorize the injecting of a wholly new and different controversy into the action. The point is without merit. The action is as much and as fully authorized by sections 5900–5902, found in chapter 76, as it is by said section 2525.

2. Appellants' next point is that in an action brought by the attorney general, under said sections 5900–5902, to forfeit the charter of a bank, a creditor cannot, under the provisions of said chapter 76, proceed to enforce the stockholders' liability until after judgment in the action; and, as no judgment has yet been entered in this action, the demurrer should be sustained. The next two sections of chapter 76 read as follows:

"Sec. 5903. If such application is made by a creditor of any corporation whose directors or stockholders are made liable by law for the payment of such debts, in any event or contingency, such debtors [directors] or stockholders, or any of them, may be made parties to the action, either at the time of filing the complaint, or in any subsequent stage of the proceedings, whenever it becomes necessary to enforce such liability.

"Sec. 5904. If any creditor of a corporation desires to make such directors or stockholders parties to the action, after a judgment therein against the corporation, he may do so, on filing a supplemental complaint against them founded upon such judgment; and if such decree

was rendered in a proceeding instituted by the attorney general, such creditor may, on his application, be made complainant therein, and may, in like manner, make the directors and stockholders sought to be charged, defendants in such action."

It will be observed that section 5903 authorizes a creditor to proceed to enforce the stockholders' liability only when the original application was made by a creditor, while section 5904 authorizes a creditor, after judgment, to enforce such liability, whether the action was commenced by a creditor or by the attorney general, and adds:

"If such decree was rendered in a proceeding instituted by the attorney general, such creditor may, on his application, be made complainant therein, and may, in like manner, make the directors and stockholders sought to be charged, defendants in such action."

Evidently the legislative intent is to permit the attorney general to proceed to judgment of forfeiture without being embarrassed or delayed by the additional litigation necessary to enforce the stockholders' liability. But this does not entitle the stockholders to immunity from such litigation during the time the attorney general's suit is pending. The creditor may proceed to enforce such liability under section 5905, which reads as follows:

"Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose, in any district court which possesses jurisdiction to enforce such liability."

Again, under sections 5900 and 5901, the action for forfeiture of the charter may be instituted by a creditor as well as by the attorney general, and, if the former brings the action, he or some other creditor may proceed therein, before judgment, to enforce the stockholders' liability. It can make no difference to the stockholders whether their liability is enforced in a suit brought by a creditor, or in one brought by the attorney general. From all of these considerations, we are of the opinion that it was for the purpose of protecting the attorney general from embarrassment and delay in his suit, and not for the purpose of giving any immunity to the stockholders during the pendency of that suit, that the legislature withheld from the creditor the right to proceed to enforce the stockholders' liability in that suit until after judgment therein.

If, during the pendency of the attorney general's suit, a creditor had commenced a separate supplemental action, under section 5905, to enforce the stockholders' liability, the two actions could, in the discretion of the court, and with the consent of the attorney general, be consolidated, notwithstanding the objections of the defendant stockholders. If the two actions may be thus consolidated with the attorney general's consent, why, with his consent, may not the creditor's action be brought in the attorney general's action, and as a part of the same? We see no reason why. Then we are of the opinion that the intervenor's complaint was properly allowed, and is not demurrable. Respondent has raised no question as to whether or not, on the ground of demurrer stated, the points raised on the argument could be considered, and we will not pass on that question.

Order affirmed.

P. J. MURPHY v. CHARLES BACKER.[1]

April 21, 1897.

Nos. 10,342—(61).

Usury—Cross-Examination of Witness.

In an action between plaintiff, the borrower, and defendant, the lender, of money, the issue on the trial was whether or not the loan was usurious. The court permitted the defendant, against objection and exception, to be asked on cross-examination whether he had not made certain other usurious loans to other persons at other times. *Held*, it is in the discretion of the trial court whether or not it will allow cross-examination as to such collateral matters, and this court is unable to say that in this case the trial court abused its discretion.

Same—Impeachment.

A witness for defendant denied on cross-examination that he had stated at a certain time and place that he had borrowed money of defendant at a certain usurious rate of interest, and thereupon the court, against objection and exception, permitted the witness to be contradicted by proof that he had made such statement. *Held*, as the question related to a collateral matter, the party asking it was bound by the answer; and it was error to allow the

[1] Reported in 70 N. W. 799.

answer to be contradicted, when the evidence given to contradict the same was prejudicial to defendant.

Appeal by defendant from an order of the district court for Morrison county, Baxter, J., denying a motion for a new trial after a verdict for plaintiff for $185.50. Reversed.

Taylor, Calhoun & Rhodes, for appellant.

Lindbergh, Blanchard & Lindbergh, for respondent.

CANTY, J. The plaintiff mortgaged certain chattels to defendant to secure a loan of money made by the latter to the former. There was a default in the mortgage. Defendant took possession of the chattels and foreclosed the mortgage on the same. This is an action of trover to recover the value of the chattels on the claim that the loan was usurious, and that therefore the mortgage was void. Plaintiff had a verdict, and from an order denying a new trial the defendant appeals.

1. It is assigned as error that the court permitted plaintiff to cross-examine defendant as to whether or not the latter had not made certain other usurious loans to other persons at other times. It is true that this cross-examination related to collateral matters, but whether or not such cross-examination should be allowed is within the discretion of the trial court, and we cannot say that in this case the court abused its discretion.

2. The court, against objection and exception, permitted Cook, one of defendant's witnesses, to be asked on cross-examination if he had not stated to plaintiff, at a certain time and place, that he (Cook) had borrowed money of defendant at the rate of 4 per cent. a month interest. The witness denied having made the statement, and thereupon plaintiff was called as a witness on his own behalf, and, against objection and exception, was permitted to testify that Cook had so stated. This is assigned as error. Cook had not, in his examination-in-chief, given any testimony as to any other loan. Whether or not the court abused its discretion in permitting the question to be asked of him on cross-examination it is not necessary to decide, because, if the ruling was error, it was error without prejudice, as the witness denied having made the statement. But, conceding that the court did not abuse its discretion in allowing the question to be asked of Cook, still, the question relating to a matter wholly collateral to the issues on the trial, de-

fendant was bound by Cook's answer; and it was error to allow that answer to be contradicted, when the evidence given to contradict the same might prejudice the defendant. For this error the order appealed from must be reversed, and a new trial granted.

So ordered.

CHARLES CLIFFORD v. FRANK G. MINOR and Another.[1]

April 21, 1897.

Nos. 10,363—(29).

Mortgage—Assumption—Pleading.

Plaintiff is the assignee of notes and a mortgage made to "John L. Merriam." The mortgaged premises were conveyed to defendant Ryan, who, in the deed to her, assumed and agreed to pay a mortgage thereon, given by the same mortgagor to "John L. Merriam and wife," securing a like sum. The complaint alleges these facts, and further alleges that the words "and wife," above quoted, "are surplusage, and were inserted in the deed by mistake." *Held*, in the absence of allegations showing that no mortgage had existed to which these words could apply, the statement that they are surplusage, and were inserted by mistake, is a mere conclusion of law, and the complaint does not show that defendant assumed plaintiff's mortgage.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., sustaining a demurrer to the complaint. Affirmed.

R. A. Walsh, for appellant.

Stevens, O'Brien, Cole & Albrecht, for respondent.

CANTY, J. The defendant Ryan demurred to the amended complaint on the ground that it does not state facts sufficient to constitute a cause of action, and from an order sustaining the demurrer plaintiff appeals.

John L. Merriam was the owner of a certain city lot, and he and his wife conveyed it by deed to Hannah Cameron, who, in consideration thereof, made to John L. Merriam her two promissory notes for $300 each, and secured the same by a mortgage on the lot. Merriam as-

[1] Reported in 70 N. W. 798.

signed the mortgage and indorsed the notes to this plaintiff. Cameron, after the conveyance to her, conveyed the lot to one Minor, who in the deed to him assumed and agreed to pay the mortgage. He subsequently conveyed to one Middleton, who conveyed to the defendant Ryan. The deed to Ryan contains the following provision:

"Subject to a certain mortgage given by Hannah Cameron to John L. Merriam and wife for the sum of six hundred ($600) dollars, securing two promissory notes of three hundred ($300) dollars each, due on or before one and two years, with interest at the rate of eight (8) per cent. per annum, payable semi-annually, which the second party [defendant Ryan] hereby assumes and agrees to pay according to the tenor of the notes secured by said mortgage."

A covenant in substantially the same form is found in the deed to Middleton. The amended complaint alleges all of the foregoing facts, and, as to the covenant above quoted in the deed to Mrs. Ryan, it further alleges:

"That the words 'and wife,' where they occur in said covenant, after the words 'John L. Merriam,' are surplusage, and were inserted therein by the inadvertence and mistake of the scrivener and party who drew and prepared said deeds, and the mutual error of both parties to the deed."

On these allegations plaintiff prays judgment against Mrs. Ryan for the amount due on his notes and mortgage.

There is nothing to show that the mortgage made to Merriam and assigned to plaintiff is the mortgage which Mrs. Ryan assumed in the deed to her. For all that appears from the complaint, Hannah Cameron may have made to Merriam and wife notes and a mortgage answering in all respects the description in the above-quoted covenant in the deed to Mrs. Ryan. The allegation of the complaint that the words "and wife," in said covenant, are surplusage, and were inserted by mistake, is not alone sufficient to show the contrary, and is a mere conclusion of law. We do not deem it necessary that the deed to Mrs. Ryan be reformed in equity. Plaintiff might simply have pleaded the legal effect of the deed,—that in and by the deed Mrs. Ryan assumed and agreed to pay plaintiff's said mortgage (if such is its legal effect). But, having set out the words of the deed, which on their face do not appear to apply to plaintiff's mortgage, it was incumbent on plaintiff to allege additional facts (not conclusions of law) from which it would appear that the words "and wife" in the description were redundant.

This might have been done by alleging facts from which it appeared that no mortgage had existed to which these words could have applied. This was not done, and for this reason the complaint does not state that Mrs. Ryan assumed plaintiff's mortgage, and does not state a cause of action.

Order affirmed.

JOSEPH HAIDER and Another v. ST. PAUL FIRE & MARINE INSURANCE COMPANY.[1]

April 21, 1897.

Nos. 10,403—(233).[2]

Insurance—Ownership of Premises.

Plaintiff, in building upon his lot, by mistake as to its boundaries built the house so that it stood 20 feet on the street and two feet on the adjoining lot, in which he had no right, title, or interest. The defendant insured the house against loss by fire by a policy containing the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The house was burned. In an action on the policy:

(1) *Held*, the condition avoiding the policy, "if the subject of insurance be a building on ground not owned by the insured," was not broken, as long as some part of the building stood on land owned by the insured in fee simple.

(2) *Held*, further, the condition avoiding the policy, "if the interest of the insured be other than unconditional and sole ownership," was not broken by erecting the building partly on the street, because, if for no other reason, the public had no right, title, or interest in the building, and, as between him and the public, he had a right to remove the same.

Same—Good Faith.

Plaintiff did not know that he had erected the building two feet, or at all, beyond the line of his lot until after the insurance policy was issued (though he discovered it before the loss). He apparently acted in good faith, and, as far as appears, no one had ever asserted any adverse claim to the two feet in question. *Held*, under these circumstances, the insurer cannot assert that the condition last above quoted was broken by the building having been erected two feet beyond the line of plaintiff's lot.

[1] Reported in 70 N. W. 805.

[2] October, 1896, term.

Appeal by defendant from an order of the district court for Ramsey county, Charles D. Kerr, J., granting a motion for a new trial. Affirmed.

McDonald & Fauntleroy and *Otto Keuffner*, for appellant.

The contract of insurance is entire and indivisible. If any part of it is void the whole is void. Plath v. Minnesota F. M. F. I. A., 23 Minn. 479, 10 Ins. Law Jour. 433; Thomas v. Commercial U. A. Co., 162 Mass. 29, 37 N. E. 672; Stevens v. Queen Ins. Co., 81 Wis. 335, 51 N. W. 555; Dohlantry v. Blue Mounds Ins. Co., 83 Wis. 181, 53 N. W. 448; Burr v. German Ins. Co., 84 Wis. 76, 54 N. W. 22; Geiss v. Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99.

The construction of the house partly upon the neighbor's lot and partly upon the public street constitutes a violation of the clause relating to unconditional ownership. Mutual L. Ins. Co. v. Leubrie, 18 C. C. A. 332, 71 Fed. 845; Weed v. London & L. F. Ins. Co., 116 N. Y. 106, 22 N. E. 229; 1 May, Ins. § 287; Hinman v. Hartford F. Ins. Co., 36 Wis. 159; Rohrbach v. Germania F. Ins. Co., 62 N. Y. 47, 62; Catron v. Tennessee Ins. Co., 6 Humph. 176; Firemen's F. Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Westchester F. Ins. Co. v. Wagner, 24 Ins. Law Jour. 476, 30 S. W. 959; Home Ins. Co. v. Smith (Tex. Civ. App.) 29 S. W. 264; Capital Co. v. Autrey, 105 Ala. 269, 17 South. 326. Ignorance on the part of the insured is no defense. Ætna Ins. Co. v. Resh, 40 Mich. 241; Hartford F. Ins. Co. v. Hass, 87 Ky. 531, 9 S. W. 720; Firemen's F. Ins. Co. v. Barker, supra; Oldham v. Anchor M. F. Ins. Co., 90 Iowa, 225, 57 N. W. 861; Lasher v. St. Joseph F. & M. Ins. Co., 86 N. Y. 423; Diffenbaugh v. Union Fire Ins. Co., 150 Pa. St. 270, 24 Atl. 745; Weed v. London & L. Fire Ins. Co., supra; Waller v. Northern Assurance Co., 10 Fed. 232.

The failure of plaintiff to inform defendant, after he discovered the true location of the premises in December, 1894, constituted a fraud on his part. If plaintiff relies on a waiver it is his duty to allege a waiver. Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Hand v. National L. S. Ins. Co., 57 Minn. 519, 59 N. W. 538; Heusinkveld v. St. Paul F. & M. Ins. Co., 96 Iowa, 224, 64 N. W. 769; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587, 5 Ins. Law Jour. 846; Eiseman v. Hawkeye Ins. Co., 74 Iowa, 11, 36 N. W. 780; 17 Ins. Law Jour. 843; Weidert v. State Ins. Co., 19 Oregon, 261, 24 Pac. 242, 19 Ins. Law Jour. 750; Moore

v. Phœnix Ins. Co., 62 N. H. 240; Schreiber v. German-American H. Ins. Co., 43 Minn. 369, 45 N. W. 708; McMartin v. Continental Ins. Co., 41 Minn. 198, 42 N. W. 934; Boyd v. Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470.

Palmer & Dickinson, for appellant.

The common law has been modified by statute so far as to permit one constructing a building, under color of title, upon the land of another to remove it, but not to permit the removal of a building constructed without color of title and without the consent of the owner. G. S. 1894, §§ 5848, 5849. The evidence was insufficient to bring this case within section 5848. Reed v. Lammel, 40 Minn. 397, 42 N. W. 202; Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; O'Mulcahy v. Florer, 27 Minn. 449, 8 N. W. 166; Wheeler v. Merriman, 30 Minn. 372, 15 N. W. 665; Hall v. Torrens, 32 Minn. 527, 21 N. W. 717; McLellan v. Omodt, 37 Minn. 157, 33 N. W. 326; Pfefferle v. Wieland, 55 Minn. 202, 56 N. W. 824.

F. C. Stevens, for respondent.

The rules of construction of such conditions in insurance policies are to be borne in mind. (1) Plaintiff should recover, if he has complied either literally or substantially with the conditions of the policy. Soli v. Farmers' M. Ins. Co., 51 Minn. 24, 52 N. W. 979, 1 May, Ins. § 284, 565; 1 Wood, Ins. §§ 145, 146; 1 Beach, Ins. § 596. (2) Plaintiff should recover if he has a substantial insurable interest in the property, and must recover unless some condition of the policy has been violated by him for which violation there is the express penalty of forfeiture. Everett v. Continental Ins. Co., 21 Minn. 76; 1 May, Ins. §§ 283, 284, 285; 2 Beach, Ins. §§ 863, 864. (3) If a fair and reasonable construction can be found that will sustain the policy and contract, it should be adopted and the policy enforced. It should be defeated only in case of necessity. 1 Wood, Ins. § 146; De Graff v. Queen Ins. Co., 38 Minn. 501, 38 N. W. 696; Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85; Loy v. Home Ins. Co., 24 Minn. 315; Cargill v. Millers' & M. Ins. Co., 33 Minn. 90, 22 N. W. 6; Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432, 29 N. W. 125; Everett v. Continental Ins. Co., 21 Minn. 76; Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229. (4) The reason for the insertion of such a condition in the policy must

be considered and given effect, if possible. 1 Beach, Ins. § 402; Lewis v. New England F. Ins. Co., 29 Fed. 496.

The dedication of the street constituted an easement only. The plaintiff's succession to the rights of the dedicators gave plaintiff title in fee to the center of the street in front of his lot. St. Anthony W. P. Co. v. King Bridge Co., 23 Minn. 186; Rich v. City, 37 Minn. 423, 35 N. W. 2; Rich v. City, 40 Minn. 82, 41 N. W. 455; Viliski v. City, 40 Minn. 304, 41 N. W. 1050. When the whole building is defined in the condition, but only a part of it is actually affected, the prohibition does not apply. 1 May, Ins. § 263 (A); Security Ins. Co. v. Mitts, 27 Brad. 324; Illinois Ins. Co. v. Mette, 27 Ill. App. 330; Breuner v. Liverpool, L. & G. Ins. Co., 51 Cal. 101.

The clause as to title is inserted in a policy to prevent fraud and make sure that the insured has a substantial interest in the property. Lewis v. New England F. Ins. Co., 29 Fed. 496; Swift v. Vermont M. F. Ins. Co., 18 Vt. 305; 1 Beach, Ins. § 402. The clause has no reference to the quantity of the estate, but only to its quality, whether for life, in fee, etc. Caplis v. American F. Ins. Co., 60 Minn. 376, 62 N. W. 324; 1 May, Ins. § 283; 2 Beach, Ins. § 632.

Defendant has waived any breach of condition because it has not pleaded such breach of condition in its answer. Otherwise such a defense is waived. 2 May, Ins. § 591; Smith v. German Ins. Co., 107 Mich. 270; Towle v. Ionia, E. & B. F. M. F. Ins. Co., 91 Mich. 219, 51 N. W. 987; Roach v. Kentucky M. S. F. Co., 28 S. C. 431, 6 S. E. 286; Tabor v. Goss & P. Mfg. Co., 11 Colo. 419, 18 Pac. 537; Bellington v. Washington Ins. Co., 24 Fed. 549; Boulden v. Phœnix Ins. Co., 112 Ala. 422, 20 South. 587.

CANTY, J. This is an action on an insurance policy insuring a dwelling house against loss by fire. The policy contains the following clause:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The case was tried before the court without a jury on a stipulation of facts in which it is stated: That at the time the insurance policy was made and at the time of the loss plaintiff was the owner of a certain lot

1, in the city of St. Paul, but was not the owner of lot 2, adjoining lot 1, and never had or claimed any right or title in or to said lot 2. That, except as hereinafter stated, the house was his property. That the house was 45 feet in length and 16 feet in width, and was built by plaintiff two feet of its width on lot 2, without the consent of the owner of lot 2, and so stood two feet on lot 2 at the time of the loss. The balance of it was built and stood on lot 1, except that 20 feet of the front end of it stood on the street in front of the ends of lots 1 and 2, which lots abutted on said street. That at the time the policy was issued the defendant's agent personally examined the premises for the purpose of inspecting the house as a risk, and noticed that the house was not in line with the other houses, but stood further out into the street,—nearer the center of the street,—but that the street was then rough, ungraded, and obstructed by rubbish and bushes. That at that time neither plaintiff nor defendant or its said agent knew that any part of said house stood upon said street or on said lot 2, and plaintiff did not discover and was not informed as to the true location of the house as aforesaid until several months after the policy was issued, and about two months before the loss. The court found all of these facts, and thereon ordered judgment for defendant. From an order granting a new trial, defendant appeals. The only question presented on this appeal is whether the facts above stated constitute a breach of the conditions of the policy above quoted, or any of them, so as to avoid the policy.

1. There is no breach of the condition providing that, "if the subject of insurance be a building on ground not owned by the insured in fee simple," the policy shall be void. According to the well-established principles of interpretation, there is no breach of this condition until it is totally broken. As plaintiff owned in fee simple a part of the land on which the building was situated, the condition was not broken, although he did not own the other part. Thus, where a policy provided that, if the building should fall, the insurance should cease, it was held that the insurance did not cease when a part of the building fell, and the rest remained standing. Breuner v. Liverpool, L. & G. Ins. Co., 51 Cal. 101; Illinois Ins. Co. v. Mette, 27 Ill. App. 324. So, where the condition was that the premises should not become vacant and unoccupied, it was held not to be broken by the premises becoming partly vacant, when they remained partly occupied. American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771.

2. We shall now consider the other condition avoiding the policy, "If the interest of the insured be other than unconditional and sole ownership." The front end of the house was built 20 feet upon the street. It must be presumed that plaintiff was the owner in fee of the street in front of his lot to the middle of such street, and that the public had only an easement therein. Then the public had no interest in or title to this house, and can only compel plaintiff to remove the house, which, as against the public, he would have a right to do. Therefore, as between him and the public, he was the sole and unconditional owner of the house.

3. But the house also stood two feet on lot 2, and it is claimed by appellant that this part of the house had been attached to lot 2, and became a part of it; that the title and ownership of this two feet of the house was in the owner of lot 2, and therefore plaintiff was not the sole and unconditional owner of the house. Plaintiff built the house, was in the exclusive possession of it, insured it in good faith believing that he was the sole owner of it, and up to the time of the loss no one, so far as appears, asserted any adverse claim to any part of it. Is it the meaning of this condition that whenever there is a loss the insurance company may have the lot surveyed, and, if it is found that the building stood an inch, or a tenth of an inch, beyond the line of the lot on land not owned by the insured, the company shall escape liability? Is it the meaning of this clause that, whenever there is a loss, the insurance company may examine with a microscope the title to the land on which the building stood, and, if any flaw is found in that title, the company shall escape liability? In every such instance the statute of limitations might have run in favor of the insured, and he might have continued forever to be the owner of the property as against all the world, were it not for the industry of the insurance company in finding means by which to avoid its liability.

We cannot hold that by the condition in question it was intended to give the insurer a right to assert a defect in the title of the insured, which defect no one else had ever asserted. In the case of Miller v. Alliance Ins. Co., 7 Fed. 649, 651, Mr. Justice Wallace, in passing on this same condition in an insurance policy, said:

"The defendant's offer of proof was, therefore, nothing more than a proposition to show that the plaintiff, although he had a title to the mill property which apparently vested in him the sole, unconditional,

and entire ownership of the property, had a defective title * * * So long as the plaintiff, under claim of right, had the exclusive use and enjoyment of the insured property without any assertion of an adverse right or interest in it by any other person, he was the owner of the property. In the ordinary acceptation of the term, who would be considered the owner of real estate except the grantee in possession, when no adverse claim has been made by another?"

See, also, Stevenson v. Insurance Co., 26 U. C. Q. B. 148. We are of the opinion that, as to the defendant insurance company, plaintiff was the sole owner of the house, within the meaning of this policy.

The order appealed from is affirmed.

LOUISE H. HARRISON v. LUCY G. HARRISON.[1]

April 21, 1897.

Nos. 10,623—(236).[2]

Sale of Decedent's Land—Power of Probate Court.

Pursuant to G. S. 1894, § 4598, a license to sell the real estate of a deceased person for the payment of debts was granted by the probate court, and subsequently extended for two years after the year therein named as the time in which the real estate should be sold, but said real estate was not sold under said license. *Held*, said license having expired at the end of said three years, the probate court has power to grant a new or second license.

In the probate court for St. Louis county, Lucy Gray Harrison, executrix, obtained a license to sell land belonging to her testator. Louise Henry Harrison, an infant, by Henry S. Mahon, guardian ad litem, appealed to the district court for that county. From a judgment of the district court, entered pursuant to the order of Cant, J., affirming the order of the probate court, she appealed. Affirmed.

Walter Ayers, for appellant.

Henry F. Greene, for respondent.

CANTY, J. G. S. 1894, § 4598, provides:

"After an order of sale is made and said bond filed with the court, the executor, administrator or guardian shall thereupon be authorized to

[1] Reported in 70 N. W. 802.

[2] April, 1897, term.

sell the real estate as therein described, within one year after the making of such order, or within such further time, not exceeding two years, as may be allowed by said court."

Under the provisions of this section, Lucy G. Harrison, as executrix of the estate of Matthew B. Harrison, deceased, was on September 10, 1892, duly licensed by the probate court of St. Louis county to sell the real estate left by said deceased for the payment of his debts. The license required her to sell the same within one year after the making of the order, and such time was afterwards extended by the orders of that court for two years longer, so that the license expired on September 10, 1895, three years after it was granted. No sale was made under this license, and, after it so expired, the executrix applied to the probate court for a new license, which was granted. The appellant, legatee under the will, appealed to the district court, where the order granting the second license was affirmed, and thereupon said legatee appealed to this court.

The only question presented on this appeal is whether the probate court has authority to grant such second license. Appellant contends that the power of the probate court, under the statute, to sell the real estate, has been exhausted by the granting of the first license and the expiration of the three years thereafter. We cannot agree with appellant. This section applies to the estates of persons under guardianship as well as to the estates of deceased persons. We cannot hold that the legislature intended to provide that if a license was granted to sell the real estate of a person under guardianship, and three years thereafter elapsed without a sale, the probate court should never afterwards have authority in the guardianship proceeding to sell that real estate for the payment of the ward's debts. Such would be an unreasonable and uncalled for construction of the statute.

But if that is the proper construction of the statute when applied to one class of estates, it must be when applied to the other class. The probate court is a court of general jurisdiction over certain classes of subjects; its jurisdiction over such subjects should be liberally construed, and its power or jurisdiction should not, on the slightest inference, be held to have lapsed. There are reasons why the legislature should limit the life of the license without limiting the power of the probate court to sell under a new or second license. The sureties on the sale bond, or the executor or administrator may, with the lapse of

time, become insolvent; the value or condition of the property may change. The license must necessarily become stale with the lapse of time, and the legislature has seen fit to limit its life. But it should not be inferred from this that the legislature intended that the power of the probate court should, with the life of the license, be exhausted. Prior to 1885, the proviso at the end of G. S. 1878, c. 46, § 3, limited the time in which the probate court could sell the real estate of a deceased person to pay debts to three years after his death. See In re Ackerman, 33 Minn. 54, 21 N. W. 852, and Gates v. Shugrue, 35 Minn. 392, 29 N. W. 57, but that proviso was expressly repealed by Laws 1885, c. 19.

Judgment affirmed.

INDEX.

ACCORD AND SATISFACTION. See "Release," 94.

ACCOUNT. See "Appeal," 59.

ACTION.

Where the attorney general brought an action under G. S. 1894, §§ 2525, 2528, to forfeit the charter of a bank for failure to comply with the law, and a creditor, with the consent of the attorney general, filed a complaint in intervention against the stockholders to enforce their double liability, *held* that the original action was brought under sections 5900–5902 (chapter 76) as well as under sections 2525, 2528, and the provisions of chapter 76 apply to the action.

—State v. Merchants' Bank..... 506

By sections 5903, 5904, the legislature intended to allow the attorney general to obtain judgment of forfeiture without the embarrassment of litigation over the stockholders' liability, but the stockholders are not entitled to immunity from such litigation during the pendency of this action, and a creditor may proceed to enforce such liability by separate action under section 5905, or, by consent, intervene in the attorney general's action.

—State v. Merchants' Bank..... 506

See "Execution," 418; "Fraudulent Conveyance," 24; "Guaranty," 83; "Husband and Wife," 476; "Insanity," 74; "Insolvency," 56; "Insurance," 245; "Judgment," 136; "Landlord and Tenant," 374, 494; "Mortgage," 151, 436, 454; "Municipal Corporation," 1; "Negotiable Instrument," 92; "Party Wall," 25; "Statute of Limitations," 146, 169; "Village," 153.

ADMISSION. See "Evidence," 148.

ADVERSE POSSESSION. See "Insurance (Title)," 126; "Possession," 362; "Statute of Limitations," 169.

ALIMONY. See "Divorce," 444.

AMENDMENT. See "Eminent Domain," 339; "Pleading," 298.

APPEAL.

Where on appeal an order denying a new trial was reversed, and the case remanded with direction to enter judgment for plaintiff, such decision or judgment of the supreme court constituted the law of the case, and on appeal from the judgment entered on the mandate no question that might have been raised on the former appeal could be considered.

—Bradley v. Norris..... 48

Assignments of error could not be considered as to matters involved in a former appeal.

—St. Paul Trust Co. v. Kittson..... 59

APPEAL—Continued.

Retrial and settlement of an executor's account by the district court *held* in accordance with the mandate of the supreme court on a former appeal.

—St. Paul Trust Co. v. Kittson..... 59

Appellant cannot amend assignments of error after time for serving them has passed, except by consent or leave of court.

—Carpenter v. Eastern Railway Company..... 188

The question whether damages were excessive cannot be raised by a mere assignment that the court erred in denying a motion for a new trial, though one of the grounds of motion was excessive damages.

—Carpenter v. Eastern Railway Company..... 188

Assignments of error "that the court erred in its instructions to the jury, to which the defendant excepted," and "that the court erred in refusing the instructions requested by the defendant," *held* too general.

—Carpenter v. Eastern Railway Company..... 188

An order denying a motion for a new trial on the ground of newly-discovered evidence could not be reviewed, where the case was not certified to as containing all that was presented to and considered by the court on that branch of the motion.

—Gardner v. Fidelity Mutual Life Association..... 207

Whether an order denying a motion for judgment notwithstanding the verdict is appealable, quære.

—Eckman v. Lauer..... 221

Where plaintiff made a motion for judgment notwithstanding the verdict or for a new trial, and the court denied the first request but granted a new trial, *held* that plaintiff could not appeal from the part of the order which denied the motion for judgment.

—St. Anthony Falls Bank v. Graham..... 318

An order denying a motion to set aside the report of commissioners in condemnation proceedings is not appealable. Whether an order appointing them is appealable, quære.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

The certificate of the trial court that the settled case contains all the evidence is not controlling when the case shows the contrary.

—Sage v. Rudnick..... 362

Where a motion for new trial was based on three grounds, one of which was excessive damages, *held* that an assignment that the court erred in denying the motion was insufficient to raise the question whether damages were excessive.

—Sharpe v. Larson..... 428

See "Charge of Court," 65; "Evidence," 298; "Order," 35; "Practice," 298; "Res Judicata," 454.

APPLICATION OF PAYMENTS. See "Counties and County Officers," 236.

ASSIGNMENT. See "Garnishment," 281; "Mortgage," 71, 512; "Parties to Action," 41; "Verdict," 420.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See "Insolvency," 56, 287; "Negotiable Instrument," 172.

ASSIGNMENT OF ERROR. See "Appeal," 188, 428; "Charge of Court," 65.

ATTORNEY AT LAW. See "Divorce," 444; "Libel," 428; "Mortgage," 12, 454.

ATTORNEY GENERAL. See "Action," 506.

AUDITING ACCOUNTS. See "Municipal Corporation," 1.

AWARD. See "School District," 402.

BANK.

Where stockholders of a banking corporation, under authority of the articles, voted to increase its stock, and part of it was purchased by its president, who was also city treasurer and who unlawfully paid for it with city funds and sold it to third parties, the stock was not ultra vires and void, but at most voidable.

—Olson v. State Bank..... 267

In view of the lapse of time after issue of the stock before the bank failed, the want of diligence of the holders in not sooner discovering the bank's insolvency, and the corporate indebtedness outstanding, which had been incurred since the issue, the holders were not entitled to rescind as against creditors whose rights became vested by the insolvency.

—Olson v. State Bank..... 267

See "Action," 506; "Counties and County Officers," 112, 236; "Negotiable Instrument," 172, 370.

BILL OF PARTICULARS. See "Practice," 410.

BILL OF SALE. See "Fraudulent Conveyance," 116.

BOND. See "Counties and County Officers," 112, 236; "Guaranty," 103; "Principal and Surety," 106, 232, 348, 463; "Village," 153.

BONDS (WATER AND LIGHT). See "Election," 283.

BREACH. See "Insurance (Fire)," 514.

BRIDGE. See "Railway," 213.

BUILDING. See "Principal and Surety," 463.

BUILDING AND LOAN ASSOCIATION.

Insolvency of a building and loan association, so that it could not mature its stock, and proceedings to wind it up, *held* to put an end to the contract between it and its members, so far as concerned future performance.

—Knutson v. Northwestern Loan & Building Association..... 201

In adjusting matters between it and its members the court should proceed on the principle of rescission, so far as equitably applicable, and each member should to that extent receive back what he paid and pay back what he received.

—Knutson v. Northwestern Loan & Building Association..... 201

Members must bear their share of losses and expenses of the association and of the receiver's expenses. Hence borrowing members may not set off all they have paid against loans or advancements received, but enough of what they have paid should be withheld till final distribution, and only the rest be set off, and the balance of such loans or advancements should be collected from them.

—Knutson v. Northwestern Loan & Building Association..... 201

BURDEN OF PROOF. See "Insolvency," 287, 311; "Railway," 385.

CARRIER.

Plaintiff news agent on defendant's train was injured by a collision due to defendant's negligence in not stopping its train at a railroad crossing, as required by G. S. 1894, § 2706, which makes any corporation violating its provisions liable for damages to any person caused by such neglect. *Held* that defendant was liable, notwithstanding a contract exempting it from liability for injuries caused by its negligence.

—Starr v. Great Northern Railway Co..... 18

In an action for injury to horses caused by the carrier's delay in transportation and unnecessary violence in handling the train, *held* that the question of defendant's negligence and plaintiff's contributory negligence were properly left to the jury.

—Carpenter v. Eastern Railway Company..... 188

A provision in a stock-shipping contract, requiring the owner as a condition to recovery for loss or injury to give notice of claim to some agent of the carrier before removal of the stock from its place of delivery, when there was no agent at such place, *held* void.

—Carpenter v. Eastern Railway Company..... 188

A carrier by which goods were shipped from Canada by plaintiff's agent addressed to plaintiff at St. Paul, Minn., *held* warranted in entering them at a port of entry on its line as for "immediate consumption" and in paying the duties there fixed, and not bound to enter them for "transportation" to St. Paul, which was also a port of entry.

—Mitchelson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co 406

CEMETERY. See "Judgment," 131.

CERTIFICATE. See "Appeal," 207, 362; "Corporation," 224; "Deposition," 37; "Evidence," 197; "Mortgage," 303.

CERTIFICATE OF DEPOSIT. See "Negotiable Instrument," 370.

CERTIORARI.

Where on a writ of certiorari to the probate court relator prevailed, he was entitled to costs and disbursements from the opposite party in interest who had been served with citation, though the writ was directed only to the probate court.

—State ex rel. v. Probate Court..... 51

CHANGE OF COUNTY SEAT. See "Counties and County Officers," 360.

CHARGE OF COURT.

Where seven requests for instructions, several of which were erroneous, were asked, and all were refused except as given in the general charge, an exception to the refusal to give those portions which were refused and were not covered by the charge, *held* insufficient as a basis for an assignment of error.

—Lane v. Minnesota State Agricultural Society..... 65

Submission of special questions to be answered by the jury is in the discretion of the court.

—Carpenter v. Eastern Railway Company..... 188

Where the court instructed the jury to render a general verdict and also to answer specific questions, an affirmative answer to both of which was

CHARGE OF COURT—Continued.
necessary to sustain a general verdict for plaintiff, and after the jury had been out for 36 hours without agreement as to the specific questions, the court of its own motion, in the absence of defendant's attorneys, withdrew the specific questions and received a general verdict for plaintiff, *held* that such withdrawal was error.
—Ermentraut v. Providence-Washington Insurance Co..... 451
See "Appeal," 188; "Fraud," 217; "Libel," 428.

CHARITABLE CORPORATION. See "Will," 335.

CHATTEL MORTGAGE.
A chattel mortgage on a stock of goods, which provided that the mortgagor should sell the goods in regular course of business, and apply the proceeds to keeping up the stock and running the business, and the balance on the mortgage debt, *held* on its face fraudulent and void as to creditors.
—Pabst Brewing Co. v. Butchart..... 191
See "Insolvency," 287.

COLLATERAL SECURITY. See "Garnishment," 281.

COMITY. See "Insolvency," 56.

COMPLAINT. See "Action," 506.

CONDEMNATION PROCEEDINGS. See "Appeal," 339; "Eminent Domain," 339.

CONDITION. See "Insurance (Fire)," 514; "Insurance (Title)," 126; Municipal Corporation," 1; "Principal and Surety," 348; "Sale," 37.

CONSIDERATION. See "Garnishment," 281; "Insanity," 74; "Negotiable Instrument," 92.

CONSTITUTION.
Laws 1895, c. 229, "An act to establish municipal courts in incorporated cities having a population of less than 5,000 inhabitants," is not an act regulating the affairs of cities within Const. art. 4, § 33, prohibiting special legislation.
—State ex rel. v. Sullivan..... 379
Making the taking effect of the act in a city contingent on a vote of the city council is not a delegation of legislative power.
—State ex rel. v. Sullivan..... 379
See "Counties and County Officers," 352, 412; "Mechanic's Lien," 327; "Statute of Limitations," 169.

CONTRACT. See "Carrier," 18, 188; "Corporation," 224; "Fraud," 217; "Insanity," 74; "Insolvency," 311; "Mechanic's Lien," 327; "Parties to Action," 41; "Party Wall," 25; "Principal and Agent," 365; "Principal and Surety," 463; "Sale," 87, 329; "Statute of Frauds," 100.

CONTRIBUTORY NEGLIGENCE. See "Carrier," 188; "Master and Servant," 79; "Negligence," 94, 260, 423, 434; "Street Railway," 8.

CONVERSION. See "Insolvency," 56.

CONVEYANCE. See "Husband and Wife," 321.

CORPORATION.

In an action brought on behalf of the state by the attorney general, *held* that the facts found justified the conclusion of law that plaintiff was entitled to have defendant corporation dissolved and its affairs wound up, and a receiver appointed.

—State v. Cannon River Manufacturers' Association..... 14

In an action to recover the balance of an unpaid subscription for stock, *held* that defendant was estopped from asserting that the corporation was not legally organized because of failure to file with the secretary of state proof of publication of its articles, as required by G. S. 1894, § 2594.

—Hause v. Mannheimer..... 194

Under G. S. 1894, § 3415, an agreement by subscribers for stock that for each share paid for a certificate for two or more shares shall be issued is void.

—Rogers v. Gross..... 224

In an action to enforce the double liability of stockholders of an insolvent corporation, no equitable rights in favor of creditors can be based on the bare fact that such agreement has been entered into; nor can such rights be invoked in favor of stockholders who have accepted such certificates against subscribers who have paid for their stock.

—Rogers v. Gross..... 224

See "Action," 506; "Bank," 267; "Building and Loan Association," 201; "Eminent Domain," 339; "Will," 335.

COSTS. See "Certiorari," 51.

COUNTERCLAIM. See "Landlord and Tenant," 449.

COUNTIES AND COUNTY OFFICERS.

Under G. S. 1894, § 730, providing that the bond of a depositary of county funds shall be made payable to the county, a bond payable to the board of county commissioners is valid.

—Board of County Commissioners v. American Loan & Trust Co.. 112

In an action on such bond, the complaint did not allege that the principal had been designated as depositary, except as might be inferred from a recital in the bond, which was approved 18 days after its date. *Held* that, in view of G. S. 1894, § 730, requiring the bond to be approved and deposited with the county treasurer before designation of the depositary, the complaint did not sufficiently allege that a designation had been made before approval of the bond; and that, as the complaint did not allege that funds were deposited after approval, no cause of action was stated.

—Board of County Commissioners v. American Loan & Trust Co.. 112

A bank, which had been depositary of county funds and was indebted for moneys deposited, was designated depositary for a second term, and gave bond for payment on demand of all funds which should be deposited pursuant to such designation. During the second term the payments by the bank of the county's checks exceeded the amount of its deposits, but on failure of the bank in the second term a balance was still due the county. *Held* that the sureties on the bond were liable only for moneys deposited during the second term, but that, the payments by the bank having been made on one open continuous account, the law would apply them first in discharge of the prior indebtedness, and that the sureties were not entitled to have

COUNTIES AND COUNTY OFFICERS—Continued.
them applied first in discharge of the debits created by the deposits during the second term.
—Board of County Commissioners v. Citizens' Bank..... 236
Laws 1893, c. 143, "An act to provide for the creation and organization of new counties and government of the same" is not in conflict with Const. art 4, § 27, on the ground that the subject is not expressed in its title.
—State ex rel. v. Board of County Commissioners..... 352
An elector may legally sign two or more noncompeting petitions for creation and organization of new counties under Laws 1893, c. 143.
—State ex rel. v. Board of County Commissioners..... 352
All petitions for creation of such counties, competing or otherwise, if supported by valid petitions must be submitted to the electors, but only one competing proposition can be adopted at the same election; and to secure this result it must receive a majority of all the votes cast and a plurality of the votes cast on the competing propositions.
—State ex rel. v. Board of County Commissioners..... 352
Where a petition for change of county seat in due form and containing the requisite signatures has been presented, no competing petition can be received or acted on until expiration of five years after an election has been held on the first, or till it has been withdrawn without election.
—Streissguth v. Geib..... 360
Injunction lies to prevent unauthorized action by the board of county commissioners and county auditor on such second petition.
—Streissguth v. Geib..... 360
Where defendant board of county commissioners under supposed authority of an unconstitutional law caused a stream to be dammed to injury of plaintiff's mill, and defendant adopted and ratified such wrongful act, *held* that it was liable in damages.
—Schussler v. Board of County Commissioners..... 412
See "Election," 119; "Jury," 165; "Libel," 428; "Mortgage," 303; "School District," 402; "Summons," 242.

COURTS (DISTRICT). See "Pleading," 298; "Practice," 298.

COURTS (MUNICIPAL). See "Constitution," 379.

COURTS (PROBATE).
Where a license to sell real estate of a deceased person, issued by the probate court under G. S. 1894, § 4598, expires by the lapse of three years, the court has power to grant a second license.
—Harrison v. Harrison..... 520
See "Certiorari," 51; "Estate of Decedent," 51.

COVENANT. See "Landlord and Tenant," 449, 494; "Party Wall," 25.

CRIMINAL LAW.
An indictment which did not allege that defendant's saloon was not an hotel *held* bad, under G. S. 1894, § 2012, requiring persons licensed to sell intoxicating liquors "to close their places of business (hotels excepted) at eleven o'clock at night."
—State v. Jarvis..... 10

CRIMINAL LAW—Continued.

G. S. 1894, §§ 5629–5633, providing for the manner of making the jury list in Washington county, from which the grand jurors finding the indictment were drawn, *held* substantially complied with.

—State v. Goodrich..... 176

Where the grand jury were excused unless their further attendance should be required, *held* that they were properly reconvened at an adjourned term, under G. S. 1894, § 7201.

—State v. Goodrich..... 176

Uttering a false or forged instrument and making such instrument are distinct offenses; and an indictment for uttering need not set out who made the instrument, or how it was made, or the intent of the maker.

—State v. Goodrich..... 176

G. S. 1894, § 6696, makes it forgery in the third degree for a person to make false entries, with intent to defraud, in accounts or books which he is employed to keep; and knowingly uttering such entries with such intent is made forgery in the same degree by section 6702.

—State v. Goodrich..... 176

Indictments purporting to charge defendants with uttering as true false entries in an account of a survey of logs *held* to state facts constituting a public offense.

—State v. Goodrich..... 176

See "Libel," 428.

CROSS-EXAMINATION.

In an action between the plaintiff borrower and defendant lender the issue was whether the loan was usurious. *Held* that it was within the discretion of the trial court to allow defendant to be asked upon cross-examination, whether he had not made certain other usurious loans.

—Murphy v. Backer..... 510

Where a witness who had not testified to the matter in his direct examination was asked on cross-examination whether he had not made a certain statement and he denied making it, the party asking the question was bound by his answer and it was error for the court to allow another witness to contradict his answer, where the evidence given in contradiction was prejudicial to the party who called the witness who was contradicted.

—Murphy v. Backer..... 510

See "Evidence," 298; "Fraudulent Conveyance," 116.

CROSSING. See "Negligence," 434; "Railway," 213.

CUSTOM. See "Negligence," 394.

CUSTOMS DUTIES. See "Carrier," 406.

DAMAGES.

Where plaintiff was a boy of eight or nine years and his injury was such as to require amputation at the first joint of two fingers, *held* that a verdict of $1,800 was excessive.

—Gahagan v. Aermotor Co..... 252

DAMAGES—Continued.

A verdict of $4,000 for personal injuries sustained by a woman of 75 years *held* excessive.

—Johnson v. St. Paul City Railway Co..... 260

See "Appeal," 188, 428; "Garnishment," 365; "Negligence," 279; "Principal and Agent," 365; "Release," 94; "Verdict," 476.

DEED. See "Mortgage," 71.

DEFAULT. See "Judgment," 131, 368; "Sale," 37.

DEMURRER. See "Mortgage," 512.

DEPOSITARY. See "Counties and County Officers," 112, 236.

DEPOSITION.

A certificate of a notary to a deposition taken without the state, that the testimony was carefully read over to the witness before signing, *held* sufficient, though it did not conform exactly to the form provided in G. S. 1894, § 5689.

—Beckett v. Gridley..... 87

See "Evidence," 148.

DESCRIPTION. See "Election," 119.

DISCOUNT. See "Negotiable Instrument," 172.

DISMISSAL. See "Judgment," 111.

DIVORCE.

Under G. S. 1894, § 4807, providing that the aggregate allowance of alimony to a wife from the estate of her husband shall not exceed in present value one-third of the personal estate and the value of her dower in his real estate, the husband's professional income cannot be estimated in estimating his estate.

—Wilson v. Wilson..... 444

DULUTH (CITY OF). See "Election," 283.

DURESS. See "Will," 335.

ELECTION.

An attempt to establish, under G. S. 1894, §§ 10, 11, an election precinct out of portions of two counties is a nullity.

—Brattland v. Calkins..... 119

Where an order purported to establish a new election district "in Norman county" out of fifteen townships, three of which were in another county, *held* that the description could not be construed so as to reject such three towns as included by mistake.

—Brattland v. Calkins..... 119

The provisions of G. S. 1894, § 10, requiring the voters to petition the governor at least eight weeks before election to establish the precinct, and section 11, which is construed as requiring the list of precincts to be published at least six weeks before election, are mandatory.

—Brattland v. Calkins..... 119

Whether the state authorities have power to organize for election purposes the White Earth Indian reservation, and whether the governor under G. S.

ELECTION—Continued.

1894, §§ 10, 11, or the board of county commissioners under section 692, should organize election precincts in territory having no township organization in a county organized to the extent that Norman county is, quære.

—Brattland v. Calkins..... 119

Under the form of ballot submitted to the electors of the city of Duluth, on the subject of issuing water and light bonds and expending the proceeds, *held* two of the propositions were competing and that an elector could vote against, but not in favor of, both.

—Baumann v. City of Duluth..... 283

See "Counties and County Officers," 352, 360.

ELEVATOR. See "Landlord and Tenant," 494; "Sale," 87.

EMINENT DOMAIN.

The petitioner in condemnation proceedings may with leave of court amend so as to strike from the petition land as to which he does not wish to continue the proceedings, the owner thereof not objecting.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

An ordinance authorizing change of line of petitioner's railway through a city, *held* admissible in evidence, though its provisions as to rights in streets were invalid, where no rights of respondents in such streets were involved.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

Where the evidence required a finding that the petitioner's interest required the new line, it was not reversible error to receive evidence of the amount already expended therefor.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

Evidence *held* to sustain a finding that petitioner's board of directors duly determined by two-thirds vote to alter the line.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

In a petition to condemn land for railway purposes a general allegation of the purposes is sufficient.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

Under G. S. 1894, § 2750, authorizing any railway corporation to alter its line whenever it appears to the directors that it can be improved thereby, and conferring "the same rights and privileges to build such road as altered, as if it were the original line," such corporation may condemn land for such new line.

—Fletcher v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.. 339

See "Appeal," 339; "Husband and Wife," 321.

EQUITY. See "Corporation," 224; "Insolvency," 311; "Mortgage," 71, 303; "Negotiable Instrument," 257.

ESTATE OF DECEDENT.

The probate court erred in refusing to allow relator to present its claim against the estate of deceased after expiration of the time limited for presentation of claims.

—State ex rel. v. Probate Court..... 51

See "Appeal." 59; "Courts (Probate)," 520; "Evidence," 148; "Negotiable Instrument," 92.

ESTOPPEL. See "Corporation," 194; "Husband and Wife," 321; "Insolvency," 287; "Judgment," 131; "Mortgage," 71, 197.

EVIDENCE.

In an action against a city for injuries sustained by reason of a defective sidewalk, *held* error to permit plaintiff to introduce evidence that after the accident defendant had repaired the sidewalk.

—Hammargren v. City of St. Paul..... 6

In an action for rent by the receiver of the owner of the premises, where the execution and acceptance of the lease were in issue, it was error to permit a witness to testify to declarations of one who had been agent of the owner before the receivership, made subsequently thereto and tending to show the execution and acceptance of the lease.

—Paget v. Electrical Engineering & Supply Co..... 81

In an action for injuries due to the negligence of defendant in permitting a dangerous horse, a track bolter, to run in a race controlled by it, in which plaintiff rode, without informing her of the character of the horse, there was evidence that one of defendant's officers knew the horse would bolt in practice, and that it came on the track with blinkers. *Held* that expert testimony that a horse which bolts in practice will bolt in a race, and for what purpose blinkers are put on race horses, was competent.

—Lane v. Minnesota State Agricultural Society..... 65

An objection to a question to show the position of the horses when plaintiff was injured, *held* properly sustained, where the witness had fully testified to the point.

—Lane v. Minnesota State Agricultural Society..... 65

The statement of a witness as to a fact not presumptively within his knowledge, which was capable of direct proof, *held* to be his mere conclusion, and not evidence on which a verdict could be sustained.

—Traders' Insurance Co. v. Herber..... 106

On trial of an appeal from disallowance of a claim against the estate of a decedent, testimony as to his admissions was admitted over the objection of defendant, who then stated that he should show that decedent was a ward of the probate court and incompetent to make admissions affecting his estate. After the close of plaintiff's case, defendant introduced the records of the probate court showing that decedent had been declared incompetent for drunkenness and was under guardianship when the admissions were made. *Held* that the question of the admissibility of the admissions was not presented by the record.

—Johanson v. Hoff..... 148

At a trial without a jury, in order to lay a foundation for reading the testimony of an absent witness taken at a former trial, plaintiff offered in evidence affidavits showing that the witness was ill and that his deposition could not be taken. On defendant's objection, the court stated "Evidence received, subject to the objection," and a transcript of the witness' former testimony was introduced without objection. *Held* that the statement of the court was not a ruling, and that the question which would have been presented had the court overruled the objection was not open for review.

—Johanson v. Hoff..... 148

EVIDENCE—Continued.

In an action for personal injuries, *held* error to permit a physician to testify as to statements made by plaintiff concerning the manner in which the injuries were caused.

—Weber v. St. Paul City Railway Co..... 155

Certificates and letters of the register of the local land office and the commissioner of the general land office *held* entitled to no weight as evidence, as being mere legal conclusions of the officer concerning the legal effect of the records in his office.

—Preiner v. Meyer..... 197

In an action on an insurance policy by the widow and beneficiary of the insured, *held* that she could not on cross-examination be questioned as to statements made to her by her deceased husband.

—Beckett v. Northwestern Masonic Aid Association..... 298

The defense was suicide. The insured was found dead with a bullet hole in the back of his head and a revolver in his hand. There was evidence that there were no powder marks around the wound. *Held* that, to rebut the theory of suicide, it was competent to prove experiments with the same revolver showing at what distances the object fired at was found to be powder-burned.

—Beckett v. Northwestern Masonic Aid Association..... 298

Whether a witness is qualified as an expert is for the court, and its ruling will not be reversed on appeal unless clearly erroneous.

—Beckett v. Northwestern Masonic Aid Association..... 298

Evidence of identity of one talking through a telephone *held* sufficient.

—William Deering & Co. v. Shumpik..... 348

See "Appeal," 207, 362; "Cross-Examination," 510; "Deposition," 37; "Eminent Domain," 339; "Fraudulent Conveyance," 116; "Garnishment," 281; "Husband and Wife," 321; "Insurance (Life)," 298; "Master and Servant," 79; "Negligence," 221, 260, 279, 423; "Negotiable Instrument," 172, 308; "New Trial," 48; "Possession," 362; "Principal and Agent," 184; "Principal and Surety," 348; "Public Land," 197; "Railway," 385; "Release," 94; "Sale," 37; "Statute of Limitations," 169; "Verdict," 476; "Will," 335.

EXCEPTION. See "Charge of Court," 65.

EXCHANGE. See "Negotiable Instrument," 425.

EXECUTION.

In an action to enjoin an execution sale of real property, of which the complaint alleged plaintiff was in possession and legal owner by a title admitted to be of record and which he claimed was superior to any that could be acquired by a purchaser at such sale, where the gravamen of the complaint was that by such threatened sale insurance had been and would be canceled, *held* that a temporary injunction to restrain the sale was properly denied.

—Pelican River Milling Co. v. Maurin..... 418

EXECUTOR AND ADMINISTRATOR. See "Appeal," 59.

EXPERIMENTS. See "Evidence," 298.

EXPERT. See "Evidence," 65, 298.

FALSE ENTRIES. See "Criminal Law," 176.

FALSE REPRESENTATIONS. See "Fraud," 217; "Insurance (Life)," 207.

FEES. See "Mortgage," 12, 454.

FINDINGS OF COURT. See "Landlord and Tenant," 494; "Mortgage," 12; "Negotiable Instrument," 62, 172; "Order," 35; "Public Land," 197; "Railway," 385; "Res Judicata," 385.

FORCIBLE ENTRY AND DETAINER. See "Landlord and Tenant," 449; "Public Land," 197.

FORECLOSURE. See "Judgment," 131; "Mortgage," 12, 43, 71, 151, 160, 436, 454; "Statute of Frauds," 100.

FORGERY. See "Criminal Law," 176.

FRAUD.

In an action to rescind a contract whereby plaintiff purchased a mortgage from defendants, relying on their false representations that the premises were improved, *held* that the evidence sustained a finding that such representations were made.

—Riggs v. Thorpe..... 217

It was immaterial that defendants did not know the representation was false, if they made it as of their own knowledge with intent to induce plaintiff to rely on it, and she did rely on it.

—Riggs v. Thorpe..... 217

Where the court in its general charge fully stated the law applicable to the case, it was not error to refuse to charge that, "unless the jury are satisfied that defendant made fraudulent representations with intent to defraud the plaintiff," she cannot rescind.

—Riggs v. Thorpe..... 217

See "Fraudulent Conveyance," 116; "Judgment," 136.

FRAUDULENT CONVEYANCE.

In an action to set aside conveyances as in fraud of creditors, a complaint which alleged that plaintiff had been appointed receiver in supplemental proceedings, but did not allege of whom, did not show that plaintiff was entitled to maintain the action.

—Tvedt v. Mackel..... 24

In an action of replevin by a mesne purchaser of goods attached by defendant in an action against the original owner, certain testimony of plaintiff on redirect examination as to a conversation with his vendor *held* competent, as explaining a fact brought out on cross-examination and as showing the transaction between them.

—Mix v. Ege..... 116

Certain testimony of plaintiff on redirect examination *held* competent as rebutting an inference of bad faith in the purchase, which might be drawn from his cross-examination.

—Mix v. Ege..... 116

Where the issue was whether the goods were transferred to plaintiff in fraud of creditors, *held* that the record in another action against the alleged

FRAUDULENT CONVEYANCE—Continued.
fraudulent vendor, in which the goods were also attached, was properly excluded.
—Mix v. Ege..... 116

In such action the bill of sale from the original owner to plaintiff's vendor was admissible.
—Mix v. Ege..... 116

If plaintiff's vendor was an innocent purchaser, it was immaterial that plaintiff had notice of the fraudulent intent of the prior vendor.
—Mix v. Ege..... 116

See "Chattel Mortgage," 191; "Insolvency," 287.

FREIGHT ELEVATOR. See "Landlord and Tenant," 494.

GARNISHMENT.
The disclosure of the garnishee is competent evidence in favor of a claimant and against plaintiff, to show what property has been impounded and to identify that to which the claimant is asserting a right.
—Bradley v. Thorne..... 281

A pre-existing indebtedness was sufficient consideration for an assignment as collateral security to the claimant.
—Bradley v. Thorne..... 281

Garnishees who denied their indebtedness and claimed that their damages more than offset it, *held* chargeable with interest as damages for the detention of money.
—Ray v. Lewis..... 365

GOVERNOR. See "Election," 119.

GRAIN. See "Principal and Surety," 232.

GRAIN ELEVATOR. See "Sale," 87.

GRAND JURY. See "Criminal Law," 176.

GUARANTY.
Where defendant transferred to plaintiff and guarantied the collection of a note made in Wisconsin by a resident of that state, who afterwards became a resident of Illinois, *held* that plaintiff could maintain an action on the guaranty without first following the maker to Illinois.
—Fall v. Youmans..... 83

Plaintiff was not obliged to prove that the maker had no property in Wisconsin from which the note might be collected.
—Fall v. Youmans..... 83

A bond, in which the maker agreed to guaranty the obligee named against certain liability, construed as merely an agreement to indemnify him and to save him harmless, and not as an agreement for benefit of a third party in whose favor such liability was incurred.
—Walsh v. Featherstone..... 103

GUARDIAN AND WARD. See "Evidence," 148; "Pleading," 298.

HENNEPIN COUNTY. See "Mechanic's Lien," 327.

HIGHWAY.

Where plaintiff, while driving in a city by night along a graded street, with which he was acquainted, caused or allowed his horse to turn out of the street so that plaintiff was precipitated over an embankment, *held* that the city was not liable for his resulting injuries, though the street was not fenced or lighted.

—McHugh v. City of St. Paul..... 441

See "Evidence," 6; "Injunction," 36; "Railway," 213, 385.

HORSE. See "Evidence," 65; "Sale," 37.

HUSBAND AND WIFE.

Plaintiff's husband while living apart from her and reputed unmarried conveyed land by deed, which described him as unmarried, and defendant school district by condemnation acquired the supposed title. Plaintiff learned of the deed and record after his death, but asserted no claim till after 13 years, when the land had appreciated and been improved by defendant. *Held* that she was estopped from asserting title.

—Holcomb v. Independent School District..... 321

It was not error to admit evidence that plaintiff's husband was reputed to be single.

—Holcomb v. Independent School District..... 321

Evidence *held* to sustain a finding that plaintiff acquired knowledge of her husband's ownership and conveyance, notwithstanding her denial.

—Holcomb v. Independent School District..... 321

A married woman can maintain an action against persons who entice her husband from her and alienate his affections, and thereby cause a separation between them.

—Lockwood v. Lockwood..... 476

See "Divorce," 444; "Evidence," 298; "Mortgage," 71; "Principal and Agent," 293; "Verdict," 476.

ILLEGALITY. See "Corporation," 194; "Negotiable Instrument," 308.

INCUMBRANCE. See "Insurance (Title)," 126.

INDIAN RESERVATION. See "Election," 119.

INDICTMENT. See "Criminal Law," 10, 176.

INDORSER. See "Negotiable Instrument," 370.

INJUNCTION.

A temporary injunction *held* properly dissolved.

—Gorton v. Town of Forest City..... 36

See "Counties and County Officers," 360; "Execution," 418; "Res Judicata," 385.

INNOCENT PURCHASER. See "Fraudulent Conveyance," 116.

INSANITY.

Where plaintiff was injured while traveling over defendant's railway in a car of another company, which without notice of his insanity paid him a sum of money in consideration of his release of his cause of action, and he recovered his sanity immediately afterwards, *held* that he could not

INSANITY—Continued.
maintain an action for his injuries against defendant without having offered to rescind or restore the consideration.
—Morris v. Great Northern Railway Co..... 74
See "Statute of Limitations," 169.

INSOLVENCY.
Acceptance by a creditor from his debtor of a preferential security, voidable under the insolvency law, does not constitute a wrongful conversion.
—Hay v. Tuttle..... 56
In the absence of a prior wrongful conversion, the assignee in insolvency had no election to sue for the value of the property.
—Hay v. Tuttle..... 56
The assignee's complaint alleged facts constituting a voidable preference, and a demand and refusal, and asked for judgment for the value of the property. Defendant being a nonresident, plaintiff caused his property to be attached. Defendant answered, denying that the transfer was a preference, or that demand for a return had been made. Plaintiff failed to prove demand or conversion. *Held* that defendant having been compelled to defend his property in an action for conversion, it would be a breach of comity, amounting to a fraud, to permit plaintiff to treat the action as one to set aside the transfer and for recovery of the property.
—Hay v. Tuttle..... 56
A chattel mortgage executed before, but not filed of record till after, the mortgagor's assignment for benefit of creditors is void as to them.
—Shay v. Security Bank..... 287
The purchaser of the mortgaged property from the assignee has the same right as the assignee to avoid such mortgage.
—Shay v. Security Bank..... 287
Such assignee is presumed to represent creditors and the burden is on one asserting the contrary to prove it.
—Shay v. Security Bank..... 287
The burden was on the mortgagee to prove that the creditors had such notice of the unrecorded mortgage that they were not in a position to take advantage of the failure to record.
—Shay v. Security Bank..... 287
A. and B., creditors of D., all corporations, at D.'s request agreed that if B. would extend the time of payment of its claim, it should be preferred and paid in full before any payment on A.'s claim, and B. gave the extension. A receiver of D. was appointed under the insolvency laws, and A. and B. proved their claims. *Held* that B. was equitably entitled to be paid A.'s dividends until B.'s claim was paid in full, but was not entitled to the proceeds of collaterals transferred by D. to A. before the agreement.
—Plymouth Cordage Co. v. Seymour..... 311
A. pledged part of its claim, which consisted of past due demand notes, to trustees to secure a loan. *Held*, that the burden was on the trustees to prove that they had not notice of B.'s equity to priority of payment from D.'s assets.
—Plymouth Cordage Co. v. Seymour..... 311
See "Bank," 267; "Building and Loan Association," 201; "Corporation," 224; "Insurance (Credit)," 245.

INSURANCE.

The insurance commissioner has not authority to transfer, surrender or exchange securities deposited with him under G. S. 1894, § 3332, in trust for policy holders, without approval of the state treasurer as provided by section 3155, and such attempted transfer and surrender is void.

—Hayne v. Metropolitan Trust Co..... 245

In an action by a receiver for policy holders to recover securities deposited with the commissioner and transferred by him to a trust company in exchange for others, *held* that the action was not for rescission, and that plaintiff need not make good to the trust company securities given by it in exchange and retained by the insurance company which had not come into his hands, but that he need only return those which had come into his possession from the commissioner.

—Hayne v. Metropolitan Trust Co..... 245

Though the securities deposited with the commissioner in trust for policy holders exceeded the minimum required by statute, the whole were bound by the trust.

—Hayne v. Metropolitan Trust Co..... 245

The court had jurisdiction over the state auditor as respects control and disposition of such trust fund for benefit of policy holders, though the state, as such, had no interest.

—Hayne v. Metropolitan Trust Co..... 245

INSURANCE (CREDIT).

Laws 1881, c. 123 (G. S. 1894, §§ 3331–3337), authorizes the business of insurance against losses from insolvency of persons to whom goods have been sold on credit.

—Hayne v. Metropolitan Trust Co..... 245

INSURANCE (FIRE).

Where an owner of a city lot by mistake built a house so that it was partly upon his lot, partly upon the adjoining lot not owned by him, and extended 20 feet into the street in front of his lot, the location of the house did not constitute a breach of a clause in the policy of insurance that the policy should be void if the interest of the insured is other than unconditional and sole ownership or if the subject of insurance is a building on ground not owned by the insured in fee simple. *Held*, so long as some part of the building stood on land owned by the insured in fee simple the condition in the policy was not broken. *Held*, that as to the building erected in the street the condition was not broken, because the public had no title in the building and as to it the owner could remove the building.

—Haider v. St. Paul Fire & Marine Insurance Company..... 514

The owner of the house was ignorant that he had built it beyond the line between his lot and the adjoining lot, and it did not appear any adverse claim had ever been made to the part upon the adjoining lot. Apparently he acted in good faith. *Held*, that the insurer could not assert the condition in the policy was broken by erecting the house so that it extended two feet upon the adjoining lot.

—Haider v. St. Paul Fire & Marine Insurance Company..... 514

See "Charge of Court," 451; "Execution," 418; "Mortgage," 436; "Principal and Agent," 365; "Principal and Surety," 106.

INSURANCE (LIFE).

In an action against a mutual life insurance association, *held* that evidence of false representations made by defendant's soliciting agent, whereby plaintiff was induced to surrender a certificate of insurance, was properly excluded, on the ground that plaintiff did not offer to prove that the agent was authorized to represent defendant or that it ratified his acts.

—Gardner v. Fidelity Mutual Life Association..... 207

Where the policy required proofs of death, but did not state what they should contain, *held* that plaintiff could explain and contradict statements in such proofs as to the manner of death.

—Beckett v. Northwestern Masonic Aid Association..... 298

In an action on a policy, *held* that the evidence did not clearly establish the defense of suicide.

—Beckett v. Northwestern Masonic Aid Association..... 298

See "Evidence," 298.

INSURANCE (TITLE).

The term "Tenancy of the present occupants" mentioned in a policy as a defect in title not insured against, *held* not to include the claim of one in actual adverse possession asserting ownership in fee against the title insured.

—Place v. St. Paul Title Insurance & Trust Co..... 126

A condition in a policy prohibiting recovery unless the insured had contracted to sell the estate covered by the policy and the title had been declared by a court of last resort defective or incumbered by reason of a defect or incumbrance for which the insurer would be liable, *held* not to apply where the land was held by another in actual possession and the insured had lost it absolutely by a defect in the title.

—Place v. St. Paul Title Insurance & Trust Co..... 126

INSURANCE COMMISSIONER. See "Insurance," 245.

INTENT. See "Fraud," 217.

INTEREST. See "Garnishment," 365; "Mortgage," 160.

INTERVENTION. See "Action," 506.

INTOXICATING LIQUORS. See "Chattel Mortgage," 191; "Criminal Law," 10; "Evidence," 148.

JUDGMENT.

Where the answer does not set up a counterclaim and plaintiff does not appear at the trial, the court may dismiss on defendant's motion, but it is error to try the case and award defendant judgment on the merits.

—Diment v. Bloom..... 111

Motion to vacate a default judgment in a foreclosure action and for leave to answer, *held* properly denied on account of defendant's laches.

—Northern Trust Co. v. Crystal Lake Cemetery Association..... 131

Where a cemetery association mortgaged land which it had platted and dedicated to purposes of burial, and the mortgagee foreclosed by action, the judgment of foreclosure, though taken by default, estopped the mortgagor from afterwards contesting the validity of the mortgage.

—Northern Trust Co. v. Crystal Lake Cemetery Association..... 131

JUDGMENT—Continued.

An action under G. S. 1894, § 5434, to set aside a judgment for fraud and subornation of perjury, *held* properly dismissed, for failure of the complaint to state a cause of action. (Following Hass v. Billings, 42 Minn. 63.)

—Watkins v. Landon..... 136

In an action against a city where the summons was served on the mayor, who failed to inform the corporation counsel, *held* that it was not error to relieve defendant from a default judgment.

—Glaeser v. City of St. Paul..... 368

It was not error to refuse to postpone the hearing on defendant's application to vacate the judgment, to give plaintiff time for preparation.

—Glaeser v. City of St. Paul..... 368

See "Action," 506; "Appeal," 48, 318; "Landlord and Tenant," 494; "Mortgage," 12; "Res Judicata," 385, 454.

JUDICIAL NOTICE. See "Mechanic's Lien," 327.

JURISDICTION. See "Insurance," 245; "Summons," 242.

JURY.

Under Laws 1895, c. 328, § 1, providing for struck juries, where a party appeared at the time and place designated, and took part without objection in striking the names from a list previously prepared by the sheriff, *held* that he waived the right to object to the irregularity, if any, in the manner of selecting the names.

—Riley v. Chicago, Milwaukee & St. Paul Railway Co..... 165

The court erred in refusing to hear evidence as to the partiality of the list selected by the sheriff and in requiring the party objecting thereto to show that the sheriff had knowledge of such partiality.

—Riley v. Chicago, Milwaukee & St. Paul Railway Co..... 165

Under Laws 1895, c. 328, § 1, a party is entitled to have the jurors called as they stand on the panel.

—Riley v. Chicago, Milwaukee & St. Paul Railway Co..... 165

See "Carrier," 188; "Charge of Court," 188, 451; "Master and Servant," 141; "Physician," 46; "Principal and Surety," 106.

LACHES. See "Bank," 267; "Judgment," 131.

LANDLORD AND TENANT.

Where a lessor obtained a judgment for the amount of rent and taxes due under the lease and, upon nonpayment, a final decree adjudging the interest of the assignees of the lease terminated, *held* that by bringing such action the lessor waived strict forfeiture and right of entry under the terms of the lease, and that he must be deemed to have accepted the unexpired term and the buildings erected by the lessees in full satisfaction of his claim for rent and taxes.

—Cook v. Parker..... 374

That the landlord has violated a covenant in the lease to keep the premises in repair, and that thereby damages have resulted to the tenant, is no defense in an action under the forcible entry and detainer act (G. S. 1894, § 6118), for restitution of the premises for nonpayment of rent.

—Peterson v. Kreuger..... 449

LANDLORD AND TENANT—Continued.

Where one floor of a business building is leased and the tenant has the use of a freight elevator in common with the landlord and other tenants, the landlord retaining control over the elevator and its approaches and covenanting to keep it and them in repair, the landlord is responsible for the safe condition of the elevator.

—Olson v. Schultz..... 494

Where lessee's employé in operating such elevator, left the platform level with the floor, but before his return it had crept up some distance above the floor owing to defective construction in the elevator shaft, and upon stepping on the platform it fell to the bottom of the shaft and the employé was injured, *held* that in an action for the personal injury against the lessee, which the landlord was seasonably notified to defend, a judgment for the employé entered upon a verdict for $500 was conclusive against the landlord that the elevator was out of repair, that the employé was injured by reason of its defective condition, and as to the amount of damages sustained by the employé.

—Olson v. Schultz..... 494

Where the court found that neither landlord nor lessee knew the elevator was out of repair, that lessee's manager in charge of the factory maintained on the leased floor had notice that a bolt in the top of the arm of the elevator cage was lost, but the loss of such bolt would not cause the elevator to fall if the guide strips on the elevator shaft had been properly constructed, and they were not, *held* that the findings are not sufficient to prevent plaintiff lessee from recovering from defendant landlord the amount of the judgment and expenses in the former action brought by the employé.

—Olson v. Schultz..... 494

See "Evidence," 31; "Insurance (Title)," 126; "Possession," 362.

LATENT DEFECT. See "Sale," 329.

LEASE. See "Landlord and Tenant," 374, 449; "Possession," 362.

LEGISLATURE. See "Constitution," 379.

LETTERS. See "Evidence," 197; "Sale," 87.

LIBEL.

A publication concerning a county attorney and attorney at law *held* libelous per se.

—Sharpe v. Larson..... 428

Where a publication was libelous per se, *held* proper to charge that plaintiff was entitled to a verdict in some amount without proof of malice.

—Sharpe v. Larson..... 428

LICENSE. See "Courts (Probate)," 520.

LIEN. See "Mechanic's Lien"; "Mortgage," 454.

LIVE STOCK. See "Carrier," 188.

LOAN. See "Cross-Examination," 510; "Negotiable Instrument," 172.

LOGS. See "Criminal Law," 176.

MALICE. See "Libel," 428.

MALPRACTICE. See "Physician," 46.

MARRIED WOMAN. See "Husband and Wife," 321, 476; "Mortgage," 71; "Verdict," 476.

MASTER AND SERVANT.

In an action for personal injuries due to defendant's negligence in failing to guard saws which plaintiff was employed to operate, *held* that the evidence showed that he was guilty of contributory negligence or had assumed the risk.

—Anderson v. C. N. Nelson Lumber Co..... 79

A servant may not neglect to use ordinary care against patent dangers, on the assumption that his master has done his duty.

—Anderson v. C. N. Nelson Lumber Co..... 79

The mere fact that a duty is imposed on the master by statute does not change the rules as to contributory negligence or assumption of risk.

—Anderson v. C. N. Nelson Lumber Co..... 79

In an action for personal injuries *held* that it was for the jury to determine whether defendant's superintendent was vice-principal, and whether the injuries resulted from his negligence.

—Johnson v. Minneapolis General Electric Co..... 141

In an action for injuries received by a child from a windmill left unguarded in a public street where it had been erected as a sample by defendant's sales agent, *held* that in determining whether the doctrine of respondeat superior applied, the test was whether, under the contract of employment, defendant had the right to control the action of its agent in setting up sample mills, and that on the evidence this question was for the jury.

—Gahagan v. Aermotor Co..... 252

See "Negligence," 94, 221, 394, 423.

MECHANIC'S LIEN.

A subcontractor who furnished material for erection of the "New Court House and City Hall" for Hennepin county and the city of Minneapolis could not acquire a mechanic's lien.

—Burlington Manufacturing Co. v. Board of Court House Commissioners 327

The court takes judicial notice of the act providing for erection of said building.

—Burlington Manufacturing Co. v. Board of Court House Commissioners 327

No lien or right of seizure and sale for material so furnished is conferred by Const. art. 1, § 12, as amended.

—Burlington Manufacturing Co. v. Board of Court House Commissioners 327

Where brick furnished by a subcontractor and used were inferior in quality to those called for by his contract with the contractor and by his contract with the owner, *held* that the owner had no defense against the subcontractor's lien except such as could be interposed by the contractor against the claim for personal judgment against him.

—Wisconsin Red Pressed-Brick Co. v. Hood..... 329

See "Principal and Surety," 463.

MINNEAPOLIS, CITY OF. See "Mechanic's Lien," 327.

MISTAKE. See "Insurance (Fire)," 514.

MONEY HAD AND RECEIVED. See "Pleading," 436; "Practice," 410.

MORTGAGE.

In an action to foreclose a mortgage the complaint alleged, the answer admitted and the court found, that the mortgage provided for $75 attorney's fees, but the complaint did not allege, nor the court find, their value, nor did the conclusions of law provide for their payment. A form of judgment which adjudged said attorney's fees due was approved by defendant's attorney and by the court, and judgment was so entered. *Held*, that defendant's application to modify the judgment by striking out the part relating to attorney's fees was properly denied.

—Murray v. Chamberlain..... 12

Where in an action to foreclose a mortgage a receiver was appointed to collect and apply the rents to the payment of delinquent taxes and interest on a prior mortgage, it was not ground for discharge of the receiver that, pending the action, the first mortgagee had paid the taxes, added them to the amount duly foreclosed, and bid in the property for the full amount.

—Farmers' National Bank v. Backus..... 43

Such purchase by the first mortgagee operated as a discharge of interest and taxes between him and the mortgagor, but not between the mortgagor and the second mortgagee; and merely increased by that amount the *sum* payable by the second mortgagee to redeem.

—Farmers' National Bank v. Backus..... 43

Defendant purchased the equity of redemption of a married woman on her representation that she was sole and redeemed from a mortgage foreclosure sale of the premises. Afterwards plaintiff obtained quitclaim deeds from the husband and wife and from the purchaser at the foreclosure sale. *Held*, that though defendant's deed was void and he not a legal redemptioner, yet the redemption amounted to an equitable assignment of the purchaser's interest, and that the wife, the purchaser and plaintiff were estopped from asserting that the redemption did not so operate.

—Knight v. Schwandt..... 71

Where on foreclosure by advertisement the mortgagee bid in the property for more than the amount due, the mortgagor was entitled to recover the surplus, though the property was worth less than the amount bid. (Following Maudlin v. American S. & L. Assn., 63 Minn. 358.)

—Babcock v. American Savings & Loan Association..... 151

To redeem from a foreclosure sale the mortgagor must pay the sum for which the property was sold, with interest at 7 per cent., though the mortgage provides for interest at a lesser rate.

—Evans v. Rhode Island Hospital Trust Co..... 160

A grantee of a mortgagor *held* not estopped as against the mortgagee from asserting a paramount title.

—Preiner v. Meyer..... 197

The owner of a second mortgage made by a remote grantee of the first mortgagor who had covenanted to pay the taxes, *held* disqualified from acquiring a tax title as against the first mortgagee.

—American Baptist Missionary Union v. Hastings..... 303

MORTGAGE—Continued.

Where the second mortgagee foreclosed and for several years received the rents, which exceeded the amount paid by him for tax certificates of sale, and paid no interest on the first mortgage during the last year before surrendering possession thereunder, *held* that equity did not require the first mortgagee to reimburse him for the amount paid for the certificates.

—American Baptist Missionary Union v. Hastings..... 308

Where plaintiff first mortgagee redeemed from the tax sales, the certificates whereof were held by defendant whose relation to plaintiff's title did not appear of record, by paying under protest the necessary amount to the county treasurer. *held* that such payment was not voluntary.

—American Baptist Missionary Union v. Hastings..... 303

A mortgagee holding a fire insurance policy procured by the mortgagor, which provided that loss, if any, should be payable to the mortgagee as his interest should appear, foreclosed and bid in for the amount of the debt. Before expiration of the year for redemption the buildings were injured by fire, the mortgagor repaired the damage with the mortgagee's consent, and the insurer paid the loss to the mortgagee. There was no redemption. *Held* that the mortgagor could not recover the amount so paid from the mortgagee.

—Carlson v. Presbyterian Board of Relief..... 436

In an action to foreclose a railway trust deed where a trustee in a prior deed was made a party, an order was made allowing fees to its counsel for less than their claim, and they procured an order whereby the amount allowed was paid over. The court then set apart, and directed to be paid to a trust company, money to pay interest on bonds held by the parties whom said counsel had represented. *Held* that such money was part of the trust funds, and that the order allowing fees was a bar to an action by said counsel for additional compensation for the same services and to impress a lien therefor on the money in custody of the trust company.

—Truesdale v. Farmers' Loan & Trust Co..... 454

Such action did not come within the exception in the order directing payment of the fees allowed, to the effect that such payment should not preclude recovery by said counsel of further compensation from the persons represented by them.

—Truesdale v. Farmers' Loan & Trust Co..... 454

Where plaintiff, assignee of a mortgage which ran to J. L. M. and the notes secured by it, in his complaint alleged that the mortgaged premises were conveyed by the mortgagor to defendant R. who, in the deed, assumed and agreed to pay a mortgage thereon given by the mortgagor to J. L. M. and wife, securing the same sum, and that the words "and wife" "are surplusage and were inserted in the deed by mistake," *held* that the complaint, on demurrer, does not show that defendant assumed plaintiff's mortgage in the absence of allegations showing that no mortgage had existed to which these words could apply.

—Clifford v. Minor..... 512

See "Fraud," 217; "Judgment," 131; "Negotiable Instrument," 62; "Principal and Agent," 293; "Public Land," 197; "Statute of Frauds," 100.

MOTION. See "Appeal," 428; "Judgment," 131; "New Trial," 48; "Res Judicata," 454.

MUNICIPAL CORPORATION.

Under G. S. 1894, §§ 989, 990, providing that the supervisors constitute a town board for auditing accounts, and section 687, providing that before any account shall be audited the claimant shall file an itemized and verified claim, the filing of such claim is a condition precedent to the right of action against the town.

—Old Second National Bank v. Town of Middletown..... 1

See "Constitution," 379; "Counties and County Officers," 412; "Eminent Domain," 339; "Evidence," 6; "Highway," 441; "Village," 153.

NEGLIGENCE.

Where plaintiff sectionman on defendant's railway fell from a hand car and was run over by another hand car which had been following close behind at high speed, *held* that the evidence justified the jury in finding that defendant's servants were negligent, that their negligence was the proximate cause of plaintiff's injuries, and that he was not guilty of contributory negligence.

—Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 94

Where an act is negligent, the actor is liable for any injury proximately resulting, although he could not reasonably have anticipated that injury would so result.

—Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 94

Where plaintiff was in the employ of contractors for erection of a church, who had sublet the stone work to defendants, and was injured by falling from a scaffold which was tipped over by a hoist rope operated by an employé of defendants, *held* that the evidence sustained a verdict in favor of plaintiff.

– Eckman v. Lauer..... 221

Where plaintiff was injured by a collision between defendant's street car and a carriage in which she was riding and which was under control of another, *held* that the evidence sustained a finding that her injury was caused by defendant's negligence, and that there was no evidence to submit to the jury on the question of her contributory negligence.

—Johnson v. St. Paul City Railway Co..... 260

In an action for damages resulting from acts alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the acts alleged are such that they could not be negligent under any evidence admissible under the allegations.

—Stendal v. Boyd..... 279

In an action for the death of a child caused by defendant's negligence in leaving unguarded on a vacant lot a pool of water, *held* that the complaint stated a cause of action.

—Stendal v. Boyd..... 279

In an action against a railway company for death of a yard switchman *held* that plaintiff failed to prove any negligence of defendant on which a verdict for plaintiff could be sustained.

—Moore v. Great Northern Railway Co..... 394

NEGLIGENCE—Continued.

A verdict for plaintiff could not be based on defendant's failure to observe a custom in regard to operation of trains, established for protection of employés, where its observance would not have prevented the result.

—Moore v. Great Northern Railway Co..... 394

In an action for personal injuries received while operating a circular saw and alleged to be due to defendant's negligence in furnishing a defective machine, *held* the evidence justified a dismissal on the ground of plaintiff's contributory negligence.

—Wulff v. Walter A. Wood Harvester Co..... 423

Where deceased was killed by defendant's train at a crossing *held* that it conclusively appeared that he was guilty of contributory negligence.

—Burau v. Great Northern Railway Co..... 434

See "Carrier," 18, 188; "Evidence," 6, 65; "Landlord and Tenant," 494; "Master and Servant," 79, 141, 252; "Physician," 46; "Street Railway," 8.

NEGOTIABLE INSTRUMENT.

Findings construed to mean that certain notes were taken in absolute payment and extinguishment of an indebtedness represented by notes secured by mortgage.

—Wiley v. Dean..... 62

Such findings *held* justified by the evidence.

—Wiley v. Dean..... 62

Where plaintiff's intestate, with money which he held as agent or partner of his father, and without the latter's knowledge, paid the debts of one of defendants and took their note for the amount payable to himself, plaintiff could recover thereon.

—Cooper v. Hayward..... 92

Whether the discount of a bill or note, with the general indorsement of the holder, is a sale of the paper, or a loan to the holder, secured by the paper and indorsement, is generally a question of fact.

—Stolze v. Bank of Minnesota..... 172

Plaintiff's assignor indorsed and delivered its customer's notes to defendant bank and was credited on its books with the amount as a general deposit. In an action by the assignee for benefit of creditors to recover the balance of the deposit, the court found as a fact that the transaction was a loan, secured by the notes, and as conclusion of law that defendant had a right to an equitable set-off of the loan against the deposit, though the loan was not due when the assignment was made. *Held* that the evidence sustained the findings and that the conclusion was right.

—Stolze v. Bank of Minnesota..... 172

One who purchases commercial paper with knowledge that interest is overdue and unpaid takes subject to existing equities between the original parties.

—First National Bank v. Forsyth..... 257

In a suit on a note *held* that there was no evidence that defendant was accommodation maker, or that it was given for an unlawful purpose, or that the holder had misapplied collaterals.

—Mahoney v. Barber..... 308

NEGOTIABLE INSTRUMENTS—Continued.

Defendant was sued as indorser of the following certificate of deposit: "The Bank of Zumbrota. Zumbrota, Minn., July 27, 1893. J. J. Starz has deposited in this bank two thousand dollars, payable to the order of himself on the return of this certificate properly indorsed, with interest at four per cent. To be left six months. No interest after maturity. Not subject to check. [Signed] E. V. Canfield, Cashier." *Held* a "time" and not a "demand" certificate, that payment was demandable at the expiration of six months, and that as between holder and indorser it matured then, and that to hold the indorser it should have been presented for payment on the last day of grace, January 30, 1894.

—Towle v. Starz..... 370

An instrument whereby the maker promised to pay to order of the payee a certain sum, "payable by New York or Chicago exchange," *held* not negotiable.

—First National Bank v. Slette..... 425

See "Guaranty," 83; "Insolvency," 311.

NEW COUNTIES. See "Counties and County Officers," 352.

NEW TRIAL.

On motion for new trial for newly discovered evidence strict proof that the moving party could not have discovered and produced the evidence by reasonable diligence is requisite.

—Bradley v. Norris..... 48

See "Appeal," 207, 318, 428; "Practice," 298.

NONRESIDENT. See "Guaranty," 83; "Principal and Agent," 293.

NORMAN COUNTY. See "Election," 119.

NOTARY PUBLIC. See "Deposition," 37.

NOTICE. See "Carrier," 188; "Fraudulent Conveyance," 116; "Husband and Wife," 321; "Insolvency," 287, 311; "Sale," 87.

ORDER.

Where, after making findings of fact and an order thereon, the court by agreement of parties made amended findings and a new order, *held* that the last was the final order for purposes of appeal.

—Billson v. Lardner..... 35

See "Appeal," 221, 318; "Election," 119; "Mortgage," 454; "Practice," 298; "Res Judicata," 454.

ORDER OF ST. BENEDICT. See "Will," 335.

ORDINANCE. See "Eminent Domain," 339.

OWNER. See "Insurance (Fire)," 514.

PARTIES TO ACTION.

Where plaintiff sold a threshing machine, and the buyers orally agreed to pay the price out of its first earnings, and earned with it an account against defendant, and again agreed with plaintiff that he should have and collect such account, of which defendant had notice, *held* that the second agreement

PARTIES TO ACTION—Continued.
operated as an assignment of the account, and that plaintiff might sue for its recovery as the real party in interest.
—Hurley v. Bendel..... 41

PARTNERSHIP. See "Principal and Surety," 106.

PARTY WALL.
The covenants of a party wall agreement *held* to run with the land and not to give a cause of action, on breach, in favor of one of the parties who had parted with his interest in the land.
—Kimm v. Griffin..... 25

PAYMENT. See "Counties and County Officers," 236; "Mortgage," 303; "Negotiable Instrument," 62.

PERJURY. See "Judgment," 136.

PERSONAL INJURY. See "Carrier," 18; "Damages," 252, 260; "Evidence," 6, 65, 155; "Highway," 441; "Insanity," 74; "Landlord and Tenant," 494; "Master and Servant," 79, 141, 252; "Negligence," 94, 221, 260, 423; "Release," 94; "Statute of Limitations," 146; "Street Railway," 8; "Verdict," 420.

PHYSICIAN.
In an action for damages resulting from the malpractice of defendant, who attended plaintiff as physician after a miscarriage, in not seasonably discovering and removing a remnant of the placenta, *held* that the question of defendant's negligence was for the jury.
—Moratzky v. Wirth..... 46
See "Evidence," 155.

PLEADING.
Where the complaint alleged that the probate court appointed G. B. guardian of the infant plaintiff, but was entitled "G. B. in Her Own Behalf, and as Guardian of A. B.," *held* that the court might after verdict grant leave to amend to "G. B. in Her Own Behalf, and A. B., by G. B. His Guardian."
—Beckett v. Northwestern Masonic Aid Association..... 298
A complaint could not be sustained as stating a cause of action for money had and received, where the general allegation was modified by specific allegations which did not support the result.
—Carlson v. Presbyterian Board of Relief..... 436
See "Counties and County Officers," 112; "Eminent Domain," 339; "Fraudulent Conveyance," 24; "Judgment," 111, 136; "Mortgage," 512; "Negligence," 279.

PLEDGE. See "Insolvency," 311; "Negotiable Instrument," 172, 308.

PORT OF ENTRY. See "Carrier," 406.

POSSESSION.
Though when the statute of limitation has run in favor of a disseisor no subsequent acknowledgment of the former owner's title except by deed will devest the title acquired by adverse possession, acceptance of a lease from such owner is competent to prove that possession was not adverse.
—Sage v. Rudnick..... 362

PRACTICE.

The district court has power, before expiration of the time for appeal from an order granting a new trial, to set the order aside on the ground that it was erroneously granted.

—Beckett v. Northwestern Masonic Aid Association..... 298

In an action for money paid by a third person for plaintiff's use, which defendant refused to pay on demand, *held* that he was not entitled to a bill of particulars under G. S. 1894, § 5246.

—Jones v. Northern Trust Co..... 410

See "Action," 506; "Appeal," 428; "Charge of Court," 65, 188, 451; "Divorce," 444; "Evidence," 148; "Judgment," 111, 368; "Jury," 165; "Order," 35; "Pleading," 298.

PREFERENCE. See "Insolvency," 56, 311.

PRESUMPTION. See "Principal and Agent," 293; "Railway," 385.

PRINCIPAL AND AGENT.

A general agent sold goods of his principal to be paid for by crediting the price on a debt due from the agent to the buyer. *Held* that at a trial after the death of both principal and agent, where there was no question of good faith, any circumstantial evidence fairly tending to establish the agent's authority to bind his principal by such a sale was sufficient to make a prima facie case.

—Stewart v. Cowles..... 184

An agent of a nonresident owner of a note secured by mortgage collected the interest coupons for several years and twice extended the mortgage by agreement with one who had purchased the premises and assumed the mortgage. In an action against the mortgagor on the note, after the principal's death, by his daughter who had acquired the note, plaintiff did not call as a witness the agent, who was her husband and hence could not be called by defendant without her consent, and offered no evidence to show the agent's want of authority. *Held* that it must be presumed that the agent had authority to make the extension or that the principal had ratified it.

—Wheeler v. Benton..... 293

As to the measure of damages for total breach by an insurance company of a contract whereby it appointed defendant its general agent for a term of years.

—Ray v. Lewis..... 365

The fact that defendant when he accepted the agency purchased from the company some of its stock, which had depreciated, *held* not to be an element of damages.

—Ray v. Lewis..... 365

See "Carrier," 406; "Counties and County Officers," 412; "Insurance (Life)," 207; "Master and Servant," 252; "Principal and Surety," 106, 232, 348; "Sale," 87.

PRINCIPAL AND SURETY.

Withholding the commission of agency by an insurance company from their agents, while permitting them to perform their duties as such, *held* not to release sureties on their bond for faithful performance of such duties.

—Traders' Insurance Co. v. Herber..... 106

PRINCIPAL AND SURETY—Continued.

The agent of an insurance company, who was short in his accounts, formed a partnership with another to carry on the agency, and they executed a bond for faithful performance of their duties as such agents. The sureties on the bond did not know that the agent was in default. *Held*, in a suit on the bond, that whether the company was guilty of bad faith, so as to discharge the sureties, in failing to disclose to them that the agent was short in his accounts, was a question for the jury.

—Traders' Insurance Co. v. Herber..... 106

In an action against sureties for breach of a bond given by an agent to buy grain, conditioned that he would account for grain purchased and pay over moneys belonging to his principal, *held* that the fact that the principal had not used and furnished for the agent scales which had been tested as required by G. S. 1894, § 2205, was not a defense.

—Eagle Roller-Mill Co. v. Dillman..... 232

In an action against a surety on a bond, where the defense was that defendant signed under an agreement with plaintiff that it should not take effect till another had executed it as surety, and that he had not done so, *held* that the evidence sustained a verdict for defendant.

—William Deering & Co. v. Shumpik..... 348

Evidence of a conversation between defendant and one who brought the bond to him for signature *held* competent on the ground that the evidence was sufficient to prove that such person was authorized to represent plaintiff in agreeing to the conditions on which defendant signed or that plaintiff had ratified the acts of such agent.

—William Deering & Co. v. Shumpik..... 348

Plaintiff and M. made a contract whereby M. was to furnish labor and material and build for plaintiff a house for a price to be paid as the work progressed in amounts not exceeding 85 per cent. of the total amount of material and labor furnished, the balance to be withheld till completion. *Held* that the fact that plaintiff during progress of the work made payments exceeding 85 per cent. of the price, without proof that such payments exceeded 85 per cent. of the total amount of materials and labor furnished, was not a defense in an action against a surety on a bond given by M. and indemnifying plaintiff against liens.

—Graves v. Merrill..... 463

See "Counties and County Officers," 112, 236.

PROXIMATE CAUSE. See "Negligence," 94.

PUBLICATION. See "Summons," 242.

PUBLIC LAND.

In an action to recover possession of land by the purchaser at foreclosure sale, it appeared that the mortgagor was in possession when he made the mortgage, and afterwards conveyed and delivered possession to defendant, who applied to the United States land office to enter the land as homestead, and that such application was pending at the time of trial. *Held* that it could not be presumed that title to the land was in the United States, and that a finding to that effect was not sustained by the evidence.

—Preiner v. Meyer..... 197

See "Evidence," 197.

PUBLIC MONEY. See "Counties and County Officers," 112, 236; "School District," 402.

PUBLIC SALES. See "Principal and Surety," 232.

RACE. See "Evidence," 65.

RAILWAY.

Where a railway company diverted a stream into an artificial channel on its right of way, so that it was necessary to build a bridge over the channel as part of a highway crossing over the track, *held* that the company must build and repair such bridge, under G. S. 1894, § 2685, requiring railway companies to build and keep in repair crossings wherever the railway lines intersect a highway.

—Board of County Commissioners v. Duluth, Red Wing & Southern Railroad Co 213

Though under a law authorizing a railway company to construct its road along a public way if "necessary," a practical and not an absolute necessity is intended, and the burden is on the company to show such necessity, the necessity once established is presumed to continue; and in a proceeding to compel change of track, the burden is on the party demanding change to prove substantial reasons for holding that public interest demands it; and testimony which would originally warrant a finding that public interests require the line to be located elsewhere will not uphold a like finding in proceedings for a change.

—Village of Wayzata v. Great Northern Railway Co..... 385

See "Carrier," 18, 188, 406; "Eminent Domain," 339; "Mortgage," 454; "Negligence," 94, 394, 434; "Res Judicata," 385.

RATIFICATION. See "Counties and County Officers," 412; "Principal and Agent," 293.

RECEIVER. See "Building and Loan Association," 201; "Corporation," 14; "Evidence," 31; "Fraudulent Conveyance," 24; "Insurance," 245; "Mortgage," 43.

RECORD. See "Insolvency," 287.

REDEMPTION. See "Mortgage," 43, 71, 160, 303, 436.

RED LAKE COUNTY. See "Counties and County Officers," 352.

RELEASE.

Though plaintiff, who did not understand English, had on payment of a small sum signed a formal release of all claims against defendant arising from the injuries for which he sought to recover, *held* that the evidence justified the jury in finding that he had not settled and released his claim for damages.

—Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 94

See "Insanity," 74.

RELIGIOUS ORDER. See "Will," 335.

REPLEVIN. See "Fraudulent Conveyance," 116.

REPUTATION. See "Husband and Wife," 321.

RESCISSION. See "Bank," 267; "Building and Loan Association," 201; "Fraud," 217; "Insanity," 74; "Insurance," 245.

RES JUDICATA.

In an action to enjoin a railway company from maintaining its tracks on a street of plaintiff village, *held* that a finding that a plea of a previous adjudication had been proved was not sustained, on the ground that the issues were not identical.

—Village of Wayzata v. Great Northern Railway Co..... 385

An appealable order, affecting a substantial right, made in determining a motion after full hearing on a controverted question of fact, and deciding a point actually litigated, is an adjudication binding on the parties and conclusive on the point passed on.

—Truesdale v. Farmers' Loan & Trust Co..... 454

See "Appeal," 48, 59; "Judgment," 131; "Landlord and Tenant," 494; "Mortgage," 454.

RETURN. See "Summons," 242.

REVIEW. See "Evidence," 148.

ST. PAUL (CITY OF). See "Evidence," 6; "Highway," 441; "Judgment," 368.

SALE.

Where a stallion was sold with warranty that he was a sure foal getter, and that otherwise the seller would replace him with another or return the notes given for the price, *held* that the seller was not in default until he had been notified that the animal did not fulfill the conditions.

—Beckett v. Gridley..... 37

Evidence that the stallion was a sure foal getter *held* admissible.

—Beckett v. Gridley..... 37

Where the complaint alleged that plaintiff sold and delivered at F. to defendant wheat for which it agreed to pay, on demand, the market price of wheat of the same grade at D. or M., less 13 cents per bushel, *held* that such contract was not established by the correspondence between the parties.

—Wemple v. Northern Dakota Elevator Co..... 87

Where on delivery of the wheat at the elevator of defendant its agent issued storage tickets, *held* that statements made by him could not control the contract in the receipts for payment of storage.

—Wemple v. Northern Dakota Elevator Co..... 87

Where the seller agreed to sell bricks of a certain grade equal to sample sent, but no sample was agreed on or sent, and the bricks were accepted without reference to sample, *held* that the contract called for bricks of a well known description and that there was no implied warranty that they were fit for the intended purpose.

—Wisconsin Red Pressed-Brick Co. v. Hood..... 329

Where there was a latent defect in the bricks caused by unfit clay and not discoverable by care and skill in inspection after manufacture, and the contractor in good faith and without knowledge of the defect bought the bricks and used them in the building, which was accepted by the owner, and the

SALE—Continued.
defect afterwards developed, *held* that the contractor being without fault was entitled to the contract price.
—Wisconsin Red Pressed-Brick Co. v. Hood..... 329
See "Fraudulent Conveyance," 116; "Principal and Agent," 184.

SALE OF REAL ESTATE. See "Courts (Probate)," 520.

SCALES. See "Principal and Surety," 232.

SCHOOL DISTRICT.
Where a division and award of moneys, funds and credits of a school district by the board of county commissioners under G. S. 1894, § 3674, did not provide means for ascertaining the amount due and left more than a ministerial act or arithmetical calculation to be done, *held* that it was not in compliance with the statute.
—Gregg v. French..... 402

SERVICE. See "Summons," 242.

SET-OFF. See "Building and Loan Association," 201; "Negotiable Instrument," 172.

SETTLED CASE. See "Appeal," 207, 362.

SHERIFF. See "Jury," 165; "Summons," 242.

SIDEWALK. See "Evidence," 6.

SPECIAL LEGISLATION. See "Constitution," 379.

STATE AUDITOR. See "Insurance," 245.

STATE OF MINNESOTA. See "Insurance," 245.

STATE TREASURER. See "Insurance," 245.

STATUTE. See "Master and Servant," 79; "Mechanic's Lien," 327; "Statute of Limitations," 146, 169.

STATUTE OF FRAUDS.
Defendant transferred to plaintiff, and guarantied the collection of, notes secured by mortgage. After dishonor of the notes defendant orally agreed that, if plaintiff would foreclose and bid in for the full amount, and if there should be no redemption, he would pay plaintiff the amount due and costs, on receiving a deed of the land. *Held* that the agreement was within the statute of frauds, both as an agreement not to be performed within a year and as a contract for sale of land or some interest therein, and that it was not taken out of the statute by plaintiff's performance.
—Veazie v. Morse..... 100

STATUTE OF LIMITATIONS.
G. S. 1894, § 5136, subd. 5, providing that actions for criminal conversation or "any other injury to the person or rights of another, not arising on obligation, and not hereinafter enumerated" must be brought within six years, was not repealed or amended by Laws 1895, c. 30, amending G. S. 1878, c. 66, § 8 (G. S. 1894, § 5138, subd. 1), which fixed the limitation at two years for actions for libel, slander, assault and battery, false imprisonment "or other tort resulting in personal injury."
—Brown v. Village of Heron Lake..... 146

STATUTE OF LIMITATIONS—Continued.

Laws 1889, c. 91, reducing to 15 years the time within which action for recovery of real property may be brought was passed in accordance with Const. art. 4, § 13, requiring a majority vote of each branch of the legislature and entry of the vote on the journal of each house.

—Kelley v. Gallup..... 169

Insanity not existing at the time the cause of action accrues will not prevent the running of the statute of limitations, under G. S. 1894, § 5147.

—Kelley v. Gallup..... 169

The evidence sustained a finding that when plaintiff's grantor entered into adverse possession the owner was not insane.

—Kelley v. Gallup..... 169

See "Possession," 362.

STOCK AND STOCKHOLDERS. See "Action," 506; "Bank," 267; "Building and Loan Association," 201; "Corporation," 194, 224; "Principal and Agent," 365.

STREET. See "Eminent Domain," 339; "Evidence," 6; "Highway," 441; "Insurance (Fire)," 514; "Res Judicata," 385.

STREET RAILWAY.

Where plaintiff was injured by alighting or falling from defendant's moving street car, *held* that he was guilty of contributory negligence.

—Saiko v. St. Paul City Railway Co..... 8

See "Damages," 260; "Evidence," 155; "Negligence," 260.

STRUCK JURY. See "Jury," 165.

SUICIDE. See "Evidence," 298; "Insurance (Life)," 298.

SUMMONS.

Under G. S. 1894, § 5204, filing the return of the sheriff is not a jurisdictional prerequisite to publication of summons. (Corson v. Shoemaker, 55 Minn. 386, overruled.)

—Easton v. Childs..... 242

See "Judgment," 368.

SUPPLEMENTARY PROCEEDINGS. See "Fraudulent Conveyance," 24.

SURPLUSAGE. See "Mortgage," 512.

TAXES. See "Landlord and Tenant," 374; "Mortgage," 43, 303.

TELEPHONE. See "Evidence," 348.

TOWN. See "Municipal Corporation," 1.

TOWNSHIP. See "Election," 119.

TRIAL. See "Evidence," 148; "Judgment," 111; "Practice," 410.

TRUST. See "Insurance," 245; "Mortgage," 454.

ULTRA VIRES. See "Bank," 267.

UNDUE INFLUENCE. See "Will," 335.

USURY. See "Cross-Examination," 510.

UTTERING FORGED INSTRUMENT. See "Criminal Law," 176.

VERDICT.

A verdict for damages for an assault *held* assignable, under G. S. 1894, § 5171, providing that after verdict in any action for a wrong such action shall not abate by death of either party.

—Kent v. Chapel..... 420

Where plaintiff and her husband made their home with the husband's parents, and the evidence tended to show that the parents urged a separation between plaintiff and her husband, a verdict against the parents for $15,000 *held* not excessive.

—Lockwood v. Lockwood..... 476

See "Charge of Court," 451; "Damages," 252, 260; "Evidence," 106; "Libel," 428; "Negligence," 394.

VICE-PRINCIPAL. See "Master and Servant," 141.

VILLAGE.

Where defendant contracted with a village of less than 3,000 inhabitants to erect a waterworks and electric light plant, and gave a bond conditioned for payment of all labor and materials, *held* that one who furnished materials on credit to defendant in reliance on the bond could not recover thereon, since a village of less than 3,000 inhabitants had not power to take a bond for the benefit of third persons.

—Park Brothers & Co. v. Sykes..... 153

See "Res Judicata," 385.

WAIVER. See "Jury," 165; "Landlord and Tenant," 374.

WARRANTY. See "Sale," 37, 329.

WASHINGTON COUNTY. See "Criminal Law," 176.

WATER. See "Counties and County Officers," 412.

WEIGHTS AND MEASURES. See "Principal and Surety," 232.

WHEAT. See "Sale," 87.

WHITE EARTH INDIAN RESERVATION. See "Election," 119.

WILL.

Where the will of a member of an incorporated religious order organized for charitable purposes gave to it all testator's property, and was witnessed by two other members, *held* that the witnesses were not incompetent under G. S. 1894, § 4428.

—Will v. Sisters of Order of St. Benedict..... 335

The fact that testator had taken a vow required by the by-laws to will all her property to the corporation did not require a finding that the will was executed under undue influence and duress.

—Will v. Sisters of Order of St. Benedict..... 335

WILL—Continued.
It was not error to permit the proponent of the will to offer evidence to disprove a fact recited in it by way of inducement.
—Will v. Sisters of Order of St. Benedict..... 335

WITNESS. See "Cross-Examination," 510; "Deposition," 37; "Evidence," 31, 65, 106, 148, 298; "Principal and Agent," 293; "Will," 335.

WORDS AND PHRASES.
"Respondeat Superior," 252.
"Tenancy of the Present Occupants," 126.

Ex. E. C.

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